No. 15,820

United States Court of Appeals

For the Ninth Circuit

BOSTON INSURANCE COMPANY,
a corporation,
Appellant,

vs.

HYRUM JENSEN, individually and doing business as Eureka Lumber Company,
Appellee.

APPELLANT'S OPENING BRIEF.

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STATEMENT OF PLEADINGS.

I. Jurisdiction of the Court.

This is an appeal from the judgment on a verdict for the plaintiff after a trial in the United States District Court of the Northern District of California, Northern Division, before the Honorable Louis E. Goodman, Judge, in an action to recover for a fire loss on a policy of fire insurance issued by defendant.

Jurisdiction of the cause below was founded on the diversity of citizenship, amount in controversy and pursuant to 28 U. S. Code, Sections 1332-1441. The pleadings show that Hyrum Jensen, plaintiff and Harold D. Jensen, third party defendant, each was a citizen of the State of California, while defendant was a corporation organized under the laws of a state

other than California, authorized to do insurance business within the State of California; and the matter in controversy exceeds, exclusive of interest and costs, the sum of $3,000.00 (1, 4-6, 8, 11, 20, 22).

II. Pleadings.

The pleadings consist of a verified complaint of Appellee, Answer and Third Party Complaint of Appellant, and Answers to Third Party Complaint by H. D. Jensen and Appellee, respectively.

A. In his verified *complaint,* Appellee Hyrum Jensen, as an individual doing business as Eureka Lumber Company, alleged: his residence in Humboldt County, State of California; compliance with user of fictitious name California Statutes; on May 21, 1956, Appellant issued a standard form of fire insurance policy to Appellee (a copy was attached as Ex. A to the complaint), wherein Appellant insured Eureka Lumber Company against loss by fire to stock up to $20,000.00; on June 25, 1956, a hostile fire damaged Appellee's stock; thereafter Appellee complied with covenants and conditions on his part to be performed, including the filing of a verified proof of loss on August 23, 1956, wherein the loss was alleged to have exceeded $20,000.00; Appellee demanded an appraisal,[1] but Appellant refused to appoint an appraiser; and that Appellant is indebted to Appellee in the sum of $20,000.00 together with interest and costs (3-6).

B. In its *Answer, Appellant* admitted: its corporate capacity according to the laws of the State of

[1]Neither the trial nor this Appeal involved issue of appraisal.

Massachusetts, authorization to transact fire insurance business in California and Appellee's California residence; execution of the fire insurance policy to Eureka Lumber Company (hereafter referred to as "Company"), but not Appellee; fire occurred on June 25, 1956, damaging some stock; proof of loss was filed and said sum of $20,000.00 was demanded but not paid (10-12). Appellant denied that Appellee complied with the conditions on his part to be performed (11); and, in this connection, Appellant alleged Appellee failed to comply with Lines 113 to 122, of the policy, requiring the insured to produce for examination all books of account, bills, invoices, and other vouchers, or certified copies thereof if originals be lost (14-15) and to submit H. D. Jensen for an Examination Under Oath (16); Appellee and H. D. Jensen entered into a conspiracy to defraud Appellant by setting said fire and by filing a false Proof of Loss; pursuant to the conspiracy H. D. Jensen set said fire, furnished the information for and Appellee filed a false proof of loss, wherein he denied knowing the cause of the fire or that there was any change in the exposure of the stock, and overstated the amount of the stock and damage thereto; and thereafter Appellee refused to produce said books, bills, invoices and vouchers, or copies thereof, and H. D. Jensen refused to submit to an Examination Under Oath (17-19); and that H. D. Jensen was a real party in interest (19).

C. With permission of the trial court, Appellant filed a *third party complaint,* wherein Appellee and H. D. Jensen were named as third party defendants,

and Appellant alleged: pendency of the subject action; said residence of the parties; execution of said fire insurance policy to Company; said fire and the conspiracy; and a right to recover over against Appellee and H. D. Jensen in the event Appellant was required to pay Company (7-10).

D. In their respective Answers to the *Third Party Complaint,* Appellee and H. D. Jensen admitted all the allegations of the Third Party Complaint, except each denied the corporate capacity of Appellant, the conspiracy, the setting of the fire, fraud or that Appellant would be entitled to recover from them (20-22; 22-24).

STATEMENT OF THE CASE.

This is an action on a California standard form fire insurance policy (Ex. 1). Appellant contended that Appellee breached the express conditions of such policy relating to the requirements to be performed including production of books and other records and H. D. Jensen submitting to an examination under oath; and Appellee and Third Party Defendant H. D. Jensen committed fraud, concealment and false swearing, relating to material facts and circumstances, such as the insurable interest of H. D. Jensen in the stock, failure to produce books and invoices, to submit to an examination under oath, knowledge of the time and origin of the fire (incendiary) and a fraudulent proof of loss; and they conspired to defraud Appellant by setting said fire and submitting a false proof of loss.

Shortly before 12:21 P.M. on June 25, 1956, a fire occurred inside the locked building of the Eureka Lumber Company (383, 408, Ex. "U", 532, 533, 240, 241, 242). The fire originated at the floor level of the first floor in the southwest room (431, 432, 400-402), and it spread upward and outward to other parts of the building (433-437).

After the fire, the northerly floor area of the southwest room showed deep seated charring, indicating that an inflammable fluid had been applied to the floor (431, 432, 445-448). At the point of origin, the firemen found an empty open topped five gallon container with a diesel fluid odor, and a 50 gallon drum containing some aviation gasoline with its pump loosely affixed, permitting gasoline fumes to escape (440). Ordinarily, such room was used to store merchandise, such as plastic shingles and plywood (101)—not diesel fluid or gasoline. There was a portable sawmill located in the southeast quarter of the west ½ of the building. In an area adjacent to the north and west sides of the portable sawmill, where Appellee claimed and testified that he stacked top grade redwood molding (141-145, 150-159), the firemen found two open topped one-gallon containers and a partially burned rag all with diesel odors in the lumber debris (418-420, 437-439, 454, Ex. Z, "AA", "AJ"), and a fireman encountered a "stubborn fire" where the one gallon containers were found (386-389). At the scene of the fire, Appellee stated he believed somebody set the fire (114).

About 12:05 P.M. bookkeeper Ellen Van Harpen left the building leaving H. D. Jensen alone in the building (495), and earlier H. D. Jensen had been in and she saw H. D. Jensen in the southwest room (495, 526-528). Shortly before the fire alarm sounded at 12:21 P.M., H. D. Jensen was observed fleeing from the direction of the building (260-264) and H. D. Jensen has admitted he was in the building until 12:15 P.M. (529).

In a Proof of Loss executed by Appellee, he claimed he had no knowledge of the origin of the fire, fixed the total inventory of stock at $63,549.54 and the loss at $33,549.59, of which $20,600 was claimed as "out of sight loss", including 66,000 board feet of top grade molding, 35,000 board feet of fence board (Ex. K, 248). Three employees familiar with the alleged storage area where Appellee described such molding and fence boards were stacked estimated the maximum quantity at 2,000 board feet of miscellaneous pieces of lumber (354, 357, 360, 370-371, 492-494, 505). Two electric motors listed in the inventory at $600 and $700 respectively were insured by Hill & Morten by another insurance company with whom Hill & Morten filed a Proof of Loss and was paid under its policy (575, 186). A set of planer heads and knives, for which $590.00 was claimed were not damaged (184, Ex. G), and metal plumbing items were useable after the fire (183), but were not taken care of (469). Retail prices were used in the Proof of Loss, not wholesale prices which were available to Appellee (467, 468). The 200 squares of plastic

shingles listed on the Proof of Loss should have been found after the fire, because they were wrapped with paper and bound by wire, but only six or seven squares were found (464, 465).

Appellee and H. D. Jensen had a financial motive to conspire to defraud Appellant. H. D. Jensen was Sales Manager and Appellee was General Manager of the business which was taken over in 1953 (230). H. D. Jensen was in Bankruptcy in 1955 (232). The Company's business had been poor since the fall of 1955 (225), and the business was H. D. Jensen's principal source of income (234). Considerable money was owed by Appellee and the company to creditors at the time of the fire (225). Checks drawn on H. D. Jensen's account were not being honored because of lack of funds (233). Three days before the fire Appellee's bank account, which was used as a company bank account, was attached by a creditor and closed for insufficient funds (202). The Court excluded other evidence offered to show a financial motive (203, 498, 501, 499, 500, 233, 498, 502, 523, 524, Ex. "AR", Iden. Ex. "AS", Iden. 560-564).

Appellee and H. D. Jensen conspired to defraud Appellant by setting such fire and filing said Proof of Loss. H. D. Jensen lived at Appellee's house (232, 233, 77, 282, 288). He was Sales Manager of the business, and Appellee acted as General Manager, working in the yard remanufacturing, sorting and loading lumber. H. D. Jensen was in charge of the books, sales and finances of the business (137, 230, 231, 572-574), and arranged for fire insurance (61).

Monies of the business were deposited in H. D. Jensen's account following his bankruptcy (232, 234, 559, 560). About ten days before the fire, he prepared and Appellee executed a false financial statement given to the Crocker-Anglo Bank for a loan (195, 198, 201, Ex. "AY", 571, and he conducted his personal business through the company (234).)

The morning of the fire other employees who reported for work were sent away (370, 494, 528-529). Shortly before the fire, Appellee took H. D. Jensen's eight year old son and his playmate away from the premises for lunch, leaving H. D. Jensen alone at the premises (245, 429, 113). Immediately following the fire, H. D. Jensen took charge of the records and inventory (237, 238); he gathered the information for and checked out the Proof of Loss before it was executed by Appellee (135, 224, 525, 526). Appellee denied knowledge of the books (223), or the amount of merchandise (224). After the fire H. D. Jensen operated under the name of the Company (235) and Appellee tried to transfer Company trucks to him (236).

After the fire, learning of the incendiary nature of the fire, the opportunity of H. D. Jensen to set the fire, his flight from the scene, the claimed inventory was grossly exaggerated, the interest of the named insured was uncertain, the books and records of the Company relating to the "out of sight" loss were being withheld, Appellant requested Eureka Lumber Company, Appellee and H. D. Jensen to produce books of account, invoices and other records of the

company for inspection and Appellee and H. D. Jensen to submit to an examination under oath (Ex. AU, 547, Ex. AV, 547, Ex. H, 205, 208). A complete set of books, records and invoices were kept by the Company and were intact after the fire (221, 487, 491). Although Appellant gave proper written request for the production of said records and for H. D. Jensen to submit to the Examination under Oath, material invoices and books were not produced (545, 548, 549, 550), and H. D. Jensen did not appear for an Examination Under Oath (217, 210).

The questions involved in this appeal and the manner in which they are raised are as follows:

1. The right of the trial Court to take from the Jury, said issues of fraud, concealment and conspiracy to defraud by acts and omissions of Appellee and H. D. Jensen, including the right of Appellant to recover back under the third party complaint. On its own motion, the trial Court took the issue of said incendiary fire and said conspiracy from the Jury upon the grounds that there was no substantial evidence to show a conspiracy to set this fire; and the Court did not submit to the Jury the issues of fraud and concealment, relating to the origin of said fire and the failure of H. D. Jensen to submit to examination under oath, and of said conspiracy to defraud by filing a false Proof of Loss or the right of Appellant to recover under the third party complaint.

2. The exclusion of evidence of the financial condition of Appellee and H. D. Jensen on the ground that there was no substantial evidence of an incendiary

fire, was raised by rulings of the trial Court sustaining objections to questions and offers of proof by Appellant on this subject.

3. The admission of hearsay testimony of Appellee and of Witness Dayton Murray, Jr. was raised by the trial Court overruling Appellant's hearsay objections.

4. The refusals to allow Appellant to cross-examine Appellee concerning his knowledge and part in causing H. D. Jensen not to appear and submit to a scheduled examination under oath and the closing inventory for the calendar year 1955, on the ground that such matters were immaterial, were raised by rulings of the trial Court sustaining objections to questions and offers of proof by Appellant on these subjects.

5. The admission of secondary evidence of an invoice without the laying of any foundation was raised by the trial Court rejecting Appellant's objection that the invoice was not the best evidence.

6. The refusal to admit written evidence pertaining to the issues of insurable interest, conspiracy and performance of policy provisions was raised by the trial Court sustaining Appellee's objection to the document, on the ground it was too remote.

7. The refusal of the trial court to instruct on the following issues:

(a) The Fraud and Concealment provisions of the policy;

(b) Fraud and Concealment as to knowledge of the origin of the fire;

(c) Fraud of the employee imputable to the employer;

(d) Appellant's right to examine under oath, and Appellee's burden to prove compliance with the requirements of the policy;

was raised by exceptions noted to the refusal of the instructions except as to the imputation of fraud to the employer to which no opportunity to except was given.

8. The error in instructing the Jury that Appellant had the burden to prove that Appellee "wilfully failed" to produce books and records was raised by Appellant excepting to such instruction.

9. The error in denying Appellant's motions for directed verdict, Judgment N.O.V. or in the alternative for New Trial was raised by the trial Court's denial of each of these motions.

SPECIFICATIONS OF ERROR.

Appellant urges that the trial court erred in:

I. **REFUSING TO SUBMIT TO THE JURY THE DEFENSE OF AN INCENDIARY FIRE AND THAT APPELLEE AND H. D. JENSEN ENTERED INTO A CONSPIRACY TO DEFRAUD APPELLANT BY SETTING THE FIRE AND BY FALSIFYING THE QUANTITY, VALUE AND DAMAGE OF THE STOCK IN THE PROOF OF LOSS (499-503).**

After the Court informed Counsel that this defense would be taken away from the Jury (501), on its own motion, the Court stated to the Jury:

"The defendant has urged as a special defense in the pleadings on file here that the plaintiff set or conspired to set the fire. This charge was made in writing in defendant's answer and was urged by defendant's counsel in his opening statement to you at the beginning of the trial. Ladies and gentlemen, this is a serious charge and amounts to charging the plaintiff with the commission of a crime, to wit, a felony. Such a serious charge should not lightly be made. I instruct you that as a matter of law the defendant has failed to present any substantial evidence to sustain such a charge, nor is there any substantial evidence from which an inference as to the truth of such charge can be drawn. Therefore, it is my instruction to you to disregard the claim of the insurance Company in this regard, and you should not consider it in any way in determining the issues in this case." (590).

At the trial Appellant urged there was substantial evidence to show the incendiary origin of the fire (500).

II. EXCLUDING EVIDENCE OF THE FINANCIAL CONDITION OF APPELLEE AND H. D. JENSEN OFFERED BY APPELLANT TO SHOW A MOTIVE ON THEIR PART TO COMMIT FRAUD AND CONCEALMENT, TO SET THE FIRE, AND TO FORM SUCH CONSPIRACY TO SET THIS FIRE AND FILE SUCH A FALSE PROOF OF LOSS.

The trial court ruled that there was no question of motive involved, and motive was immaterial as follows:

A. *In cross-examination of Appellee, Appellant was prevented from covering:*

1. *Whether there was insufficient money to meet his checks.* Appellee objected:

"I object to that."

The Court sustained the objection, stating:

"I will sustain the objection. Counsel, this is not a proper subject of inquiry in this case at this time. A man could be bankrupt and still have a perfectly legitimate claim for fire loss against an insurance company. The only question involved is, What is the validity of his claim? Not whether he is a poor man or a rich man. I will hold this whole line of inquiry, which I have ruled on before, is immaterial[2]." (233-234).

Earlier, Appellant urged that the financial condition of Appellee was admissible to prove motive (203-204). Later, its admissibility was urged by Appellant on the ground of motive and the further ground of falsification (501).

If Appellee denied that there were insufficient funds in his bank account, Appellant would have offered evidence that the checks were being returned for insufficient funds (Witnesses Ellen Van Harpen (502); Russell M. Stearns (559-562)).

2. *Financial Condition of H. D. Jensen:*

"Q. Did Harold Dee Jensen run into financial difficulties in that operation on the Hansen Road?

A. I don't know.

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[2]To the contrary are:
People v. Richard (1951) 101 C.A.2d 631, 225 P.2d 938;
People v. Hays (1950) 101 C.A.2d 305, 225 P.2d 600;
People v. Freeman (1955), 135 C.A.2d 11, 286 P.2d 565.

Mr. Hilger. I object to that as going too far afield, your Honor, incompetent, irrelevant and immaterial.

The Court. I will sustain the objection." (226).

B. *In the direct examination of Ellen Van Harpen,* Appellant urged the following questions 1 to 4, inclusive, were admissible to show motive and falsification (501), but the Court sustained an objection to each question.

1. *Whether she knew if H. D. Jensen's checks were honored when presented to his bank.* Appellee's objection was: "I will object to that as being incompetent, irrelevant and immaterial as to what the bank might have done with the checks." The Court sustained the objection, stating: "Sustained. I do not see what that has to do with this case." (498).

2. *Whether she knew of any checks being held at the bank awaiting a deposit of monies in H. D. Jensen's account* (498). The following objection by Appellee was sustained by the Court:

"Q. (By Mr. Castro) Did you have any knowledge of any checks being held at the bank awaiting monies to be deposited in the account of Harold Dee Jensen?

Mr. Hilger. I will object to that likewise as being incompetent, irrelevant and immaterial and not having anything to do with this case.

The Court. So far as I can see that is correct.

Mr. Castro. We are offering this evidence on the basis again of motive, your Honor.

Mr. Hilger. What?

The Court. I will sustain the objection. I can't see any question of motive involved as yet in this case." (408-409).

Ellen Van Harpen would have testified that checks were not honored and were held by the banker drawee pending a deposit of money to cover them, Appellant would have proved that deposits into H. D. Jensen's account had been stopped because of insufficient funds to cover outstanding bad checks held by Lumber Wholesalers (502-503).

3. *Whether any accounts were due the Lumber Wholesale Company?* The following objection by Appellee was sustained by the Court:

"Q. (By Mr. Castro): At the time of this fire was there any accounts due the Lumber Wholesale Company?

Mr. Hilger. Objection. Incompetent, irrelavant and immaterial to any issue in this case at this time.

The Court. I will sustain the objection as to any financial status of the concern on the same ground on which I heretofore ruled in connection with similar questions." (499).

Ellen Van Harpen would have testified Eureka Lumber Company owed Lumber Wholesale Company approximately $18,000.00 (503).

4. *Whether any creditor was at the Eureka Lumber Company office concerning the payment of the account he held* (499). The following objection by Appellee was sustained by the Court:

"Q. (By Mr. Castro). On the morning of this fire was any creditor of the Eureka Lumber Company at the office concerning the payment of his account?

Mr. Hilger. That is objected to as incompetent, irrelevant and immaterial at this stage of the proceeding; the same line of questioning.

The Court. Sustained. I want to make it clear that I am only ruling on this evidence at this time.

Mr. Castro. Perhaps I do not quite understand what your Honor is saying.

The Court. You can't prove motive of something until you have first brought in the corpus delicti, as it were; because somebody has a creditor or his aunt is sick you can't bring that in as evidence of arson. You first have to have some foundation for it.

Mr. Castro. Well, we have proved here—I would like to discuss it with your Honor. I would like to discuss the problem in front of the jury.

The Court. I think it is quite clear to me that the testimony is not admissible at this stage of the case.

Mr. Castro. Then I would like to make an offer of proof, because Mrs. Van Harpen is going back to Eureka this evening, your Honor.

The Court. All right. It is a little past 3:00. The jury can go out for its recess now and I will hear your offer of proof. (499-500).

(The jury left the courtroom and in their absence the following occurred:)

Mr. Castro. Concerning the foundation I would like to state this to the Court: That accepting the testimony of the plaintiff as true and

correct, that he had redwood moldings stacked in the areas that he has indicated, that in the center of those areas were found the two cans of inflammables in high priced molding of $220,000, there was evidence that in the room where the fire is said to have originated, not only by the opinion of the witness this morning but also by Neil Jensen, who saw the fire in the area, that there was evidence on the flooring of the room that flammable liquids had been placed in the floor area, I think from that evidence the jury can infer or make a finding on circumstantial evidence of arson. We can go one step further and connect Dee with it through his conduct as observed by the witness Musser fleeing the scene. That is the foundation from the arson standpoint. (500).

The Court. Have you any other evidence along that line except what you have already presented which you intend to present?

Mr. Castro. Not along that line. I think I have presented everything I know of at this time.

The Court. On the basis of the evidence that has been presented I would take that issue away from the jury. I say that to you unequivocally because in my opinion there isn't the slightest evidence that would justify the cross-complaint in this case, nor any evidence from which an inference could be drawn. There is only your argument and your statements. There is nothing excepting the question of the amount of redwood. Of course, that goes to the amount of the claim, and on that there is some conflict. That is an issue for the jury to determine.

Mr. Castro. The question of motive, and that element of the case is just as important as on the

arson end of it, and they have designated 101,000 board feet of lumber in there.

The Court. That may be a question of the correctness of the claim. You can argue that to the jury.

Mr. Castro. And the financial circumstances concerning their background at the time of the loss is certainly evidence of motive and falsification.

The Court. I can't see anything that would justify submitting that issue to the jury. There is nothing by way of motive that would justify the submission of that to the jury as far as I can see. I have listened to the testimony very briefly. (501). If you have no more evidence on it, I would instruct the jury to take that issue from the jury, and I might even go further in my instructions to the jury, counsel. I do not think the charge of arson, which is a charge of a felony, can be lightly made by an insurance company against a businessman unless they know what they are doing when they file the charge, and it can't be used as a method of defense to a claim unless there is some substantial evidence from which some inferences can be drawn, not because it is a moral question, that he hasn't got much money, not doing much business, may owe[2] some money, and they have some cans[3] in their place of gasoline or other inflammable material which are used there. Somebody sees a man drive an automobile and he is driving a little fast.[3] Those are

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[3]Circumstances from which jury could infer fraud, conspiracy and incendiary fire:

Brooks v. E. J. Willig Truck Co., (1953), 40 Cal.2d 669, 255 P.2d 802—flight;

People v. Gilyard (1933) 134 C.A. 184, 25 P.2d 35—kerosene.

not things from which justification can be drawn for the proof of what amounts to a felony. I wish to make myself quite clear to you at this point. That is why I asked the question the other day as to whether there would be any other evidence along that line, because I do not want to prejudge that question, but on the basis of your laying the foundation for the question to this witness, you might just as well know what I think about the evidence on the subject so far.

Mr. Castro. I offer to prove by this witness that the account referred to in the name of Harold Dee Jensen, the deposits into such account have been stopped by the Eureka Lumber Company, because there were outstanding bad checks against the account, (502) for which there were insufficient funds to cover after they had been issued; that the Lumber Wholesalers had such checks; that the account in the name of the Lumber Wholesalers was approximately $18,000; that on the morning of the fire the Northwestern Pacific representative had been in their office for the collection of a delinquent account, a thousand or in excess of a thousand dollars, which was promised to be paid that afternoon, and there was no cash in either bank account to cover that obligation. Those are the items that I wish to prove and that I believe this witness would testify to.

The Court. I would hold that that is not admissible in proof of the claim made in the course of the defendant's case. It might justify the plaintiff committing suicide, having a holdup, or any of a number of a thousand things, but motive does not prove offense. There might be a motive

for the plaintiff in the case to do many things if he was in sore straits, but that does not supply the evidence that is needed to prove a charge of arson. So I will hold that the evidence is incompetent, irrelevant and immaterial at this stage of the case."

Ellen Van Harpen would have testified that on the morning of the fire a representative of Northwestern Pacific Railroad Company came to collect a delinquent account of more than $1,000.00, and H. D. Jensen promised to pay in the afternoon; further, that there was no money in either the bank account of H. D. Jensen or Appellee to pay the indebtedness (503).

C. *As to a delinquent account or dishonored checks at Yellow Manufacturing Acceptance Corp.* In the direct examination of Richard Hanna, a representative of Yellow Manufacturing Acceptance Corp., (a finance company for General Motors (342) which held the finance contract on the truck and trailer the Company was purchasing from Dayton Murray Truck Sales on which the portable sawmill was a trade in) Appellant asked whether the account was delinquent on the date of the fire, or, whether he was holding any checks of Appellee which had not been honored on the date of the fire (523). The following objections by Appellee were sustained by the Court:

"Q. (By Mr. Castro). Was this account on this particular truck delinquent at the time, June 25, 1956?

Mr. Hilger. I object to it as incompetent, irrelevant and immaterial and cite that as misconduct.

The Court. Which contract?

Mr. Castro. The one that has been admitted in evidence.

The Court. You are talking about AO?

Mr. Castro. Yes, your Honor.

The Court. Was it delinquent at the time of the fire?

Mr. Castro. Yes, that is what I am asking.

Mr. Hilger. I object to it.

The Court. Sustained. You mean by that, I take it, whether or not there were payments due the finance company that had not been paid. I will sustain the objection if that is the question. (523).

Q. (By Mr. Castro). Had you received any checks from Hyrum M. Jensen covering any installments due prior to June 25, 1956?

Mr. Hilger. Same objection.

Mr. Castro. (Continuing) Which had not been honored by the bank when they were presented?

Mr. Hilger. Same objection.

The Court. Same ruling. Sustained.

Q. (By Mr. Castro). As of June 25, 1956, were you holding any checks of Hyrum M. Jensen?

Mr. Hilger. Same objection, your Honor.

The Court. Same ruling.

Mr. Hilger. I am going to suggest that further questioning along this line would be misconduct of counsel.

The Court. It is prejudicial, I think. I will sustain the objection. I have already ruled, in the absence of the jury, that those questions are immaterial in the present state of the record.

Mr. Castro. Those are all the questions I have at this time, your Honor. At the close of the session this afternoon may I make an offer of proof concerning these matters I have been asking about?

The Court. Very well, I think the questions indicate the nature of the proof you are seeking to bring in, but you may make it formally if you wish." (524).

Richard Hanna would have testified the account was delinquent at the time of the fire; after the fire Appellee voluntarily transferred the Dayton Murray Truck Sales truck to H. D. Jensen, who transferred it to Robert Halverson (522, 523, Ex. "AP", Iden.).

D. *In direct examination of C.P.A. Russell M. Stearns,* who reviewed the bank statements of the Company for Appellant, Appellant urged the following questions were admissible to show financial condition relating to motive, but the Court sustained objections to the questions.

1. *Overdrafts.*

"Q. In reviewing the records of the Eureka Lumber Company did you look for the fact as to whether or not there were any overdrafts?

A. I did.

Mr. Hilger. I will object to that.

The Court. Sustained. (560-561).

Mr. Castro. The following questions, your Honor, go to that question of financial responsibility, so I would have to make an offer of proof because I understand what your Honor's rulings are.

The Court. I take it you want the witness to testify as to what he found to be the financial condition of the plaintiff?

Mr. Castro. That is correct.

The Court. I assume they cover that field. I will sustain an objection to it." (561).

Russell M. Stearns would have established the dates and amounts of the overdrafts; attachments of the bank account; the relation between the respective bank accounts of Appellee and H. D. Jensen; the borrowing of money to satisfy the attachments and overdrafts; from April 20, 1956, through the fire, the balance in H. D. Jensen's account was less than $100.00; Appellee and H. D. Jensen were unable to meet their current obligations.

2. *Financial Statement of June 14, 1956, Ex. 18, was false:*

"Q. (By Mr. Castro). With reference to Plaintiff's Exhibit 18, a financial statement given to the Anglo California Bank on June 14th, 1956, have you reviewed that financial statement?

A. Yes.

Q. Have you reviewed that financial statement with specific reference to accounts payable?

A. Yes.

Q. Does that exhibit correctly state the accounts payable as of the date in June?

Mr. Hilger. I will object to that. It calls for a conclusion based upon an examination I do not think it was possible for him to make. He has already indicated that he has not had access or the records of 1956 in June have not been available to him for his examination. He has had no

information as to the manner of record keeping, whether it is cash, accrual, or what inventory items were considered transit and what were not. I think all he can tell us is what accounts payable he might (561) have ascertained actually existed, but as to the correctness of the documents, I think it would call for a conclusion on which he could not possibly have the basis for a valid opinion, even in view of his own testimony that he has been unable to examine the records.

The Court. I am going to curtail the examination as to financial standing. I see no relevancy of it in this case.

Mr. Castro. Again there would be an offer of proof.

The Court. Otherwise we would go into a long examination here that might take a long time as to the correctness of the financial statements that the plaintiff made to the bank. We have no concern with that here.

Mr. Castro. That is in evidence on behalf of of the plaintiff over our objection, your Honor, and it goes for the truth of the fact.

The Court. It came in connection with some testimony, not to show financial standing, but, as I recall—this record has not been written up?

Mr. Castro. No, it has not, your Honor. It came in for all purposes. I did not hear any limitation at the time.

Mr. Hilger. It came in because of the issues raised by counsel in his opening statement, which he has been unable to meet so far on the basis of the evidence.

The Court. If that is the case then I will enter- (561) tain a motion to strike out the financial statements from the record.

Mr. Hilger. Then we will move to strike it out. It was not a statement rendered to the insurance carrier and they have nothing to do with its correctness one way or the other. It goes to an issue that was raised by counsel in its opening statement but which has not developed in the trial of the matter, and therefore it would be irrelevant.

The Court. The Court admitted them on behalf of the plaintiff.

Mr. Castro. I did not offer them in evidence.

The Court. I say the Court admitted them on behalf of the plaintiff.

Mr. Castro. That is correct.

The Court. In view of the fact that you had made an opening statement in which you had made certain statements, and I ruled, although it was strictly in the sense of rebuttal, I would allow them in as statements on the theory that the Court had control over the order of proof. Since there has been no foundation laid to consider the question of financial condition, on the motion of either side, I would strike the financial statements from the record.

Mr. Hilger. In the present state of the record it relates to no issue raised here and I would move to strike it out since we offered it.

The Court. Both financial statements may be stricken, 17 and 18. (563).

(Thereupon Plaintiff's Exhibits 17 and 18 were withdrawn from evidence)" (564).[4]

Russell M. Stearns would have testified from the information he had at hand of creditors of Eureka

[4]Later, Ex. 18 placed in evidence as Ex. "AY" for limited purpose to show as of June 1, 1956, inventory only $28,080 (571).

Lumber Company; Appellee's liabilities were $169,-748.40 (not $95,679.00); accounts receivable were only $2,998.32 (not $29,404.08).

E. *Appellant urged the testimony of A. J. Franceschi, in his deposition was admissible to show* motive and falsification, but the Court sustained the following objection to it.

> "Mr. Castro. At this time I will offer in evidence the deposition of Angelo Franceschi, manager of the Crocker-Anglo Bank of Eureka, taken on September 18, 1957.
>
> Mr. Hilger. There are two depositions, one of September 7th and one of September 18th.
>
> The Court. Which one do you offer?
>
> Mr. Castro. The one of September 18th.
>
> Mr. Hilger. I will make the same objection to this deposition that I made to the previous one, your Honor.
>
> The Court. This concerns financial transactions with the bank?
>
> Mr. Hilger. That is all.
>
> The Court. Nothing else is involved? I will sustain the objection on the same ground. The deposition may be marked for identification.
>
> (The deposition referred to was thereupon marked Defendant's Exhibit AS for identification.)" (536)

A. J. Franceschi would have testified that on the purchase of the dwelling from G. R. Abrahamson, Appellee borrowed $14,000 from the Bank of America, National Trust & Savings Association, which was evidenced by a note and secured by a Deed of Trust;

that on March 1, 1956, Crocker-Anglo Bank loaned Appellee $5,000.00, and on June 18, 1956, another $5,000.00 which were payable July 31, 1956; that personal property taxes for the fiscal year 1955-56 to the City of Eureka and County of Mendocino were delinquent at the time of the fire; that a list was prepared of the attachments which were made on the accounts of Appellees; the attachments were January 5, 1956, $2,472; February 10, 1956, $530.00; June 22, 1956, $2,255.04; that the H. D. Jensen account was opened November 22, 1955, with a deposit of $300.00, and was closed November 25, 1955, and was reopened on December 5, 1955, with a deposit of $350.00 (Ex. AS Identif.).

F. *Appellant urged the testimony of G. R. Abrahamson* was admissible to show motive and falsification, but the Court sustained the following objection to it.

> "Mr. Castro. At this time I would offer in evidence the deposition of G. R. Abrahamson taken on September 18, 1957.
>
> Mr. Hilger. I will object to this on the ground it is incompetent, irrelevant and immaterial in all respects. It addresses itself to an indebtedness that this gentleman had on the purchase of a home, which indebtedness was subsequently paid.
>
> The Court. I will sustain the objection made by counsel on the same grounds heretofore stated by the Court, and you may mark the deposition for identification if you wish.
>
> (The deposition referred to was thereupon marked Defendant's Exhibit AR for identification.)" (535-6)

G. R. Abrahamson would have testified that he sold a dwelling to Appellee for the sum of $37,500 and he received a check for $2,500.00 and a note for $18,-624.58 secured by a second deed of trust, which second deed of trust note was payable $5,000 on February 1, 1956, which payment was made, leaving a balance of $13,624.58 due on May 2, 1956, that Appellee was in default and that he notified Appellee that he was in default. On June 18, 1956, he received $5,000, leaving an unpaid balance in default of $8,624.58, as of the time of the fire (Ex. AR Iden.).

G. *Allowing testimony of A. J. Franceschi—Re: Credit Standing.*

In the direct examination of Witness A. J. Francheschi in his deposition, over the following objection of Appellant, the Court permitted the witness to testify the credit standing of the Company was good. At the trial the following occurred:

> "Q. On June 25th, 1956, what was the credit standing of the Eureka Lumber Company with your bank?
>
> Mr. Castro. Objection to that, your Honor, on which we stand.
>
> The Court. I will overrule the objection.
>
> A. As far as we were concerned, it was good." (71)

The following appears in the deposition and was read silently by the Court:[5]

---

[5]The quotation appeared in the deposition and was read silently by the Court. Appellant requests that the record be supplemented to include such objection.

"Q. On June 25th, 1956, what was the credit standing of the Eureka Lumber Company with your bank?

Mr. Castro. Objected to as irrelevant, incompetent and immaterial, no bearing upon any issue in this case." (Dep. p. 5).

III. IN ALLOWING APPELLEE TO TESTIFY, ON DIRECT EXAMINATION, THAT HE HAD INFORMATION CONCERNING TWO MEN BEING SEEN, WHICH APPELLEE GAVE TO THE FIRE DEPARTMENT (114).

Appellant objected on the grounds of hearsay as follows:

"A. Yes. Mr. McBeth, one of the firemen, was there and he asked me how I thought it caught fire, and I told him I didn't know. I said, 'I think somebody set it afire.' I said, 'We had better get an investigator.' I told him and the fire chief. In the meantime we walked outside. Mr. Moser—he is a truck dispatcher that is on the opposite corner—two fellows, truck drivers, told him that they had seen two men——

Mr. Castro. Just a moment (114).

The Court. This will be hearsay, I'm afraid, counsel.

Mr. Hilger. I'm afraid that would be, your Honor. I want to establish this fact:

Q. Did you receive information concerning anyone being seen around the place?

A. Yes, I did.

Mr. Castro. I object to that as hearsay.

Mr. Hilger. I just want to find out if he received that information.

Mr. Castro. I object to that as hearsay. What information he may or may not have received in the absence of the defendant, your Honor, I believe is hearsay.

The Court. As long as he does not say what it was, he may use that fact as a preliminary to something that he did. I can't tell.

Mr. Hilger. Precisely, your Honor.

The Court. The witness is not to testify to what he heard, but he did receive some information and that much I will allow.

Q. (By Mr. Hilger). You received some information concerning someone seen at the fire, and thereupon what did you do?

A. Yes, I did.

Mr. Castro. Just a moment. Your Honor, I object to that as calling for hearsay.

The Court. I will rule on it after I hear his answer to the next question.

Q. (By Mr. Hilger). What did you do with the information so received?

A. I called Mr. McBeth, the fireman, and the (115) chief of the fireman, and a couple of police officers and told them.

The Court. All right. You gave the information that you received to some police officers.

The Witness. Yes, I did, and the fireman, Mr. McBeth, and I told him——

The Court. You can't say what you told them.

Mr. Hilger. Without saying what you said——

The Witness. I will keep still.

Mr. Hilger. You passed on the information you received.

The Witness. Okay.

The Court. I will allow the answer to stand for the purpose stated. The witness received

some information and passed it on to the police officers." (116).

IV. IN LIMITING APPELLANT'S CROSS-EXAMINATION OF APPELLEE, ON WHETHER APPELLEE KNOWINGLY, OR AS AN OVERT ACT OF THE CONSPIRACY, CAUSED H. D. JENSEN NOT TO SUBMIT TO THE EXAMINATION UNDER OATH REQUESTED BY THE LETTER OF OCTOBER 8, 1956, ON OCTOBER 12, 1956 (Ex. H, 210-211).

The Court sustained the following objections:

"Q. (By Mr. Castro). Did Harold Dee Jensen appear for the examination under oath?

A. Yes.

Q. Did Harold Dee Jensen appear for the examination under oath on October 12, 1956?

A. I don't think he did at that time.

Q. Did he appear at the office on that day?

A. No, not that I know of.

Q. Did he appear on any other occasion prior to (210) the time you filed the lawsuit for examination under oath?

Mr. Hilger. I will object. This is totally immaterial. There is no showing that it was the duty of Harold Dee Jensen to appear any place at the request of the insurance carrier. He was not the insured under the policy.

The Court. I will sustain the objection.

Q. (By Mr. Castro). Did you see Harold Dee Jensen on the morning of the examination under oath?

A. Under my examination——

Mr. Hilger. Objection.

The Court. Same ruling.

Mr. Castro. I would like to lay a foundation, your Honor. That is what I am trying to do.

The Court. What difference does it make whether he saw him or did not see him? What has that got to do with it?

Mr. Castro. There are cases that hold, your Honor, that you were entitled to examine the employee under oath on these losses.

The Court. What has that got to do with the examination of this witness? If you want to make a point of it all you have to do is to show you requested the examination but he did not appear. I do not see how that is material in the examination of this witness.

Mr. Castro. I want to show this witness sent him out of town that morning.

The Witness. That is a lie. (211)

Mr. Hilger. Does that answer the question, counsel?

Mr. Castro. I move to strike that out as not responsive.

The Court. I don't know. You brought it on yourself, counsel. You made a statement as an officer of the Court that this witness did something that is not only unconscionable but perhaps unlawful, and he has a right to respond to that. I will allow the answer to stand.

Mr. Castro. May I cross examine him?

The Court. I will hold that this type of examination at this point immaterial.

Mr. Castro. Then may I ask that the answer be stricken from the record, since I am deprived of cross examination?

The Court. No. I will allow the answer to stand for the reason I have stated. I am not going

to elaborate on it. I have already stated the reason for the Court's ruling.

Q. (By Mr. Castro). On the morning of the examination under oath did you furnish Dee Jensen your car to leave the City of Eureka?

Mr. Hilger. I will object to that as totally immaterial.

The Witness. I can answer. No.

The Court. I will sustain the objection.

Q. (By Mr. Castro). On the morning of the examination under oath, did you know that Dee Jensen was requested to appear for that examination under oath? (212)

Mr. Hilger. I object to that as immaterial.

The Court. Sustained.

Q. (By Mr. Castro). On the morning of the examination under oath you sent Dee Jensen out of the City of Eureka, didn't you?

Mr. Hilger. I will object to that and cite it as misconduct of counsel, in addition to being immaterial.

The Court. I will sustain the objection, and if counsel persists in this examination I will take further measures. You have already asked that question and he answered it in quite emphatic terms, and I do not think there is need to repeat it." (213).

Appellant would have shown that for more than one year prior to October 12, 1956, H. D. Jensen was making his home with Appellee in Eureka; on the morning of the scheduled Examination Under Oath Appellee sent H. D. Jensen out of Eureka, then Appellee appeared to be examined, but H. D. Jensen did not

appear, and both Appellee and H. D. Jensen, respectively knew he was to appear prior to the commencement of the subject action (213-220).

V. IN LIMITING APPELLANT'S CROSS-EXAMINATION OF APPELLEE AS TO WHETHER THE CLOSING INVENTORY FOR THE CALENDAR YEAR 1955 EXCEEDED $15,478.11 (202).

The following objection by Appellee was sustained by the Court:

> "Mr. Hilger. To what date are we now referring?
>
> Mr. Castro. Referring to Exhibit 18, which was the proof of loss on June 1, 1956, containing a statement fixing an inventory of $15,478.11.
>
> Mr. Hilger. I doubt if any proof of loss was filed on the date given, counsel.
>
> Mr. Castro. I am not talking about a proof of loss (202).
>
> Mr. Hilger. You stated proof of loss. You may not have meant it.
>
> Mr. Castro. Profit and loss statement.
>
> Mr. Hilger. I am going to object to that as being too remote from the date of June 5, 1956, as to what might or might not have been in there. We have gone back to December 31, 1955, which is six and a half months prior to the fire, and what inventory was there on that date has absolutely no connection.
>
> The Court. Is that what you are reading from, a profit and loss statement for 1955?
>
> Mr. Castro. June 1, 1956, to which is attached a profit and loss statement dated December 31, 1955.

The Court. Then it is a profit and loss statement for 1955 that you are referring to.

Mr. Castro. No, I am referring to a profit and loss statement which is Exhibit 18, which was under date of June 1, 1956, and attached to it on the inside is a profit and loss statement reflecting the inventory as of the close of business in 1955.

"Mr. Hilger. And the specific question has to do with the inventory of December 31, 1955, which I submit is too remote in time to have anything to do with the existence or non-existence of an inventory on June 25, 1956.

The Court. I think the objection is good . . ." (203).

An answer to such question was material to a showing that the inventory on June 1, 1956, was only $28,080 (Ex. 18, AY); and there was no record of any substantial purchases or deliveries received after June 1, 1956, to the time of the fire, when the inventory would not have exceeded $28,080 as contrasted with the prior claim of $63,549.54 (Witness Russell M. Stearns).

VI. IN ALLOWING WITNESS DAYTON MURRAY, JR., ON DIRECT EXAMINATION BY APPELLEE, TO TESTIFY:

A. *As to discussions between H. D. Jensen and W. A. Threlkeld.* From discussions with H. D. Jensen and W. A. Threlkeld, the then owner of Dayton Murray Truck Sales, that on January 1, 1956, Threlkeld agreed to accept and allow $7,500 for said portable sawmill as a trade in for a used truck and trailer

(336). Appellant objected on the grounds of hearsay, as follows:

"Q. Do you have any personal knowledge of the transaction at all, have you ever discussed it with the officials of the company?

A. I have no direct knowledge of the transaction. I have knowledge of it from discussions with Mr. Harold Dee Jensen and with Mr. Threlkeld who was the previous Manager of Dayton Murray Truck Sales.

Q. And those discussions concerning this transaction were in the course of conduct of business of Dayton Murray Truck Sales?

A. Yes, that's correct.

Q. Now just what was that transaction, Mr. Murray?"

"Mr. Castro. The following objection, Your Honor, we would ask for the Court to rule on.

The following appears in the deposition and was read silently by the Court:

'Mr. Castro. (Inter'g). Object to the question on the grounds the witness has stated he has no personal knowledge on the subject matter. He has testified he has possession of two documents, and any other information he has is purely hearsay (336).

Mr. Hilger. As a result of the discussions that you have had in the course of the conduct of business of Dayton Murray Truck Sales, state your knowledge of this situation.

Mr. Castro. Object to it as incompetent, irrelevant and immaterial, calling for hearsay. The witness has testified he has no personal knowledge of the transaction.

Mr. Hilger. Please answer the question.

The Witness. From the examination of the records of the Dayton Murray Truck Sales——

Mr. Castro. (Int'g). The question didn't call for an examination of the records of Dayton Murray Truck Sales, it called for your knowledge based upon your discussions had in the course and conduct of business of Dayton Murray Truck Sales.

The Witness. My knowledge based on my discussions of the——

Mr. Castro. (Int'g). Same objection to it, same objection that has been previously made, hearsay and the witness has stated he has no personal knowledge of the transaction.

The Witness. May I answer the question, Counsel?

Mr. Hilger. Yes.'

The Court. I will overrule the objection.

Mr. Hilger. Thank you, your Honor. I believe the question is finally answered on page 9. May I begin the reading there:

'A. My discussions with Mr. Harold Dee Jensen (337) and with Mr. Threlkeld who was the then Manager of the Dayton Murray Truck Sales at the time of this transaction and from the documents of Dayton Murray Truck Sales, Dayton Murray Truck Sales sold a nine seventy-four series Diesel truck to the Eureka Lumber Company on January 1, 1956, at least that's the date of the invoice. As a down payment to Dayton Murray Truck Sales they took a two seventy-five Cummings Diesel engine in a portable sawmill and credited four thousand dollars on the purchase price of the truck and agreed with Eureka Lumber Company to give them an additional thirty

five hundred dollar credit upon the sale of this resale by Dayton Murray Truck Sales of this sawmill unit or upon a certain date which is set forth in the invoice, whichever first occurred. I believe it was approximately six months after the date of the transaction.

Mr. Hilger. Now you have testified that in your official capacity you have custody of the records and documents of the Dayton Murray Truck Sales?

A. That's correct.' " (338).

B. *As to the meaning of a figure of $4,000.00 on an alleged carbon copy of the invoice covering the "trade in" on the used truck and trailer* (340), Appellant objected as follows:

" 'Q. What does that figure, that four thousand dollar figure represent?'

Mr. Castro. I stand on the objection made at that time.

The following appears in the deposition and was read silently by the Court:

'Mr. Castro. I object on the grounds it's irrelevant, incompetent and immaterial. The witness has already testified and my examination shows that he has no personal knowledge concerning this transaction, and the document is the best evidence of what it states, and the original of the document would constitute the best evidence.'

The Court. It is taking an awful long time to prove a simple transaction, the purchase of a truck. I will overrule the objection.

Mr. Hilger. I think we can skip all the voir dire, then, and get down to the answer to the question, which begins on page 16, line 2:

'A. The four thousand dollar figure reflects a (340) credit on the purchase price given to Eureka Lumber Company by Dayton Murray Truck Sales on the trade-in of this portable sawmill described in the document.

Q. Now in the ordinary course of conduct of Dayton Murray Truck Sales business where is the original invoice sent?

A. The original invoice would have undoubtedly been sent to the purchaser.

Q. Is the original of that invoice that you have there marked Defendant's A for identification, is the original of that document in the records of the Dayton Murray Truck Sales?

A. No, it is not.' " (340-341).

C. *As to whether there was a $3,500.00 credit in addition to said $4,000.00* (342), Appellant objected as follows:

"Q. And that thirty-five hundred dollars would be an—in addition to the four thousand dollars item that you previously testified concerning?"

"Mr. Castro. I stand on that objection.

The following appears in the deposition and was read silently by the Court:

Mr. Castro. Objected to as incompetent, irrelevant, and immaterial, no identification as to who made that notation that you are referring to. It's not part of the original document, that's obvious.

The Witness. YMAC is Yellow Manufacturing Acceptance Corporation which is the finance corporation for General Motors truck dealers.

They finance the sales of equipment. Contracts are assigned to YMAC by the dealer making the contract. The (342) significance of the notation here is that that represents the——

Mr. Castro (Int'g). Just a moment. He asked you what the initials stood for.

Mr. Hilger. I'll at this time ask you the significance of the notation.

Mr. Castro. Objected to as incompetent, irrelevant and immaterial, calling for an opinion and conclusion of the witness and not for a fact.

Mr. Hilger. Would you answer that?

The Witness. The significance of the statement on the invoice is the thirty-five hundred dollars listed is additional credit due YMAC, represents the balance of the credit on the purchase price that was given for the trade-in of the portable sawmill.

Q. That would be the purchase price paid by Dayton Murray Truck Sales for the portable sawmill?

A. That's correct.

Q. To Eureka Lumber Company?

A. That's correct.

Q. And that thirty-five hundred dollars would be an—in addition to the four thousand dollar item that you previously testified concerning?

Mr. Castro. Same objection.

The Witness. That's correct.

Mr. Castro. Same objection to this line of questions, Counsel, he has no personal knowledge of the transaction."

"The Court. Overruled.

Mr. Hilger. Then your answer is yes?

The Witness. My answer is yes." (342-344).

VII. IN ADMITTING IN EVIDENCE THE ALLEGED CARBON COPY OF SAID "TRADE IN" INVOICE AS EX. 20 (344-345).

Appellant objected to the document as follows:

"Mr. Hilger. At this time I will offer both the bill of sale and the invoice into evidence as Plaintiff's next in order.

The Court. There are documents that are attached here.

Mr. Hilger. Yes, Your Honor.

Mr. Castro. I object to the invoice on the ground it is not the best evidence of the transaction, Your Honor.

The Court. You are making an objection to the document?

Mr. Castro. Yes, the copy which was used of the invoice.

The Court. I will overrule the objection. You want them marked one exhibit?

Mr. Hilger. They may be marked as one exhibit. (The bill of sale and the invoice were thereupon received in evidence and marked Plaintiff's Exhibit 20.)" (344-5).

VIII. REFUSAL TO ADMIT IN EVIDENCE WRITTEN AGREEMENT WHEREBY H. D. JENSEN RELEASED HIS INTEREST IN THE SAWMILL ON HANSON ROAD.

During the cross-examination of Appellee, Appellant offered in evidence a written agreement between Appellee, H. D. Jensen and others, whereby the Eureka Lumber Company was taken in Appellee's name, to which the trial Court sustained Appellee's objections:

"Mr. Hilger. I object to this as incompetent, irrelevant and immaterial to any issue in this

case. It does not show who was acquiring, who was transferring. It is nothing in the world but a mutual release.

Mr. Castro. I offer the document.

Mr. Hilger. I have no objection to the authenticity of the document, Your Honor. It is just that it is immaterial and incompetent to prove anything that is in issue in this case.

The Court. It seems to have been drawn up by attorneys, but I have some difficulty in understanding it.

Mr. Hilger. It was not our office, Your Honor.

The Court. Apparently it was a 1953 transaction. I will sustain the objection on the ground it is too remote to this controversy. I think we have enough to do to try the problem of the claim here in 1956.

Mr. Castro. May we have it marked for identification?

The Court. Certainly.

(The document referred to was thereupon marked Defendant's Exhibit J for identification.)'' (229).

This document was material as to H. D. Jensen's interest in the insured policy.

IX. IN INSTRUCTING THE JURY THAT APPELLANT WAS REQUIRED TO PROVE THAT APPELLEE ''WILFULLY'' FAILED TO PRODUCE RECORDS, OTHERWISE THE FAILURE TO PRODUCE WAS NOT A DEFENSE.

Such instruction read:

''The defendant claims that the plaintiff has not complied with the policy of insurance by not producing all records which the defendant demanded,

and thereby has debarred himself from recovery in this action. Whether or not the plaintiff has so complied with the policy is a question of fact for you to determine from all the facts and circumstances disclosed by the evidence. If you find that the plaintiff substantially and willfully failed to produce material records within his power to produce, then you may find for the defendant; otherwise not. Stated somewhat differently and on the other side, as it were, you should not find in favor of the defendant on this issue unless you are convinced by a preponderance of evidence that the plaintiff willfully failed to produce records which were material to his claim of loss and within his power to produce. The defendant has the burden of proving such failure on the part of the plaintiff. I mean by that the defendant has the burden of proving that the plaintiff has substantially and willfully failed to produce records within his power to produce." (Emphasis added.)

Appellant objected to the question upon the ground that Appellant was not required to prove it was a "wilful failure", but Appellee was required to prove performance of such condition (594-595).

X. IN FAILING TO INSTRUCT THE JURY AS TO THE FRAUD OR CONCEALMENT PROVISIONS OF THE POLICY (Proposed Instruction Nos. 8, 18, 19, 21).

Appellant's proposed Instruction No. 8 read (26):

"Policy Void for Concealment or Fraud

The California standard fire policy provides:

This entire policy shall be void if, whether before or after a loss, the insured has wilfully concealed

or misrepresented any material fact or circumstances concerning this insurance or the subject thereof, or the interest of the insured therein, or in case of any fraud or false swearing by the insured relating thereto."

Appellant's Proposed Instruction No. 18 read (30):

"Concealment—Definition

Neglect to communicate that which an insured knows and ought to communicate to an insurer is concealment.

See: Insurance Code 330."

Appellant's Proposed Instruction No. 19 read (30):

"Concealment—Intent

A concealment of fact, whether intentional or unintentional, which is material to the risk voids the policy. The presence of an attempt to deceive is not required to void the policy.

Gates v. General Casualty Co. of America (1941 9th Cir.) 120 Fed 2d 925, 927; Hogel & Co. v. U. S. Fidelity & Guarantee Co. (1939) 35 C. A. 2d 171, 181; 94 P 2d 1046."

Appellant's Proposed Instruction No. 21 read (31):

"Concealment—Materiality

Materiality is to be determined not by the event, but solely by the probable and reasonable influence of the facts upon the party to whom the communication is due, in forming his estimate of the disadvantages of the proposed contracts for making his inquiries.

Insurance Code 334."

Appellant objected to the failure to instruct on such subjects by calling the omission to the Court's attention as follows (596):

"The Court. Do I understand, so your record may be complete, you are excepting for failure to give those instructions?

Mr. Castro. That I am now noting.

The Court. Because, you see, I will file your proposed instructions so that your reference to them by number would be identifiable" (596)

"Instruction number eight, relating to concealment and fraud as defined by the policy." (597)

"Instruction number eighteen, defining what is meant by the term 'Concealment'.

Instruction number nineteen dealing with the elements of intent and concealment.

Instruction number twenty-one, dealing with the elements of materiality and the concealment . . ." (597)

"The Court. Very well. All the exceptions will be noted. Will you bring the jury back and I will instruct them about the welder."

XI. IN FAILING TO INSTRUCT THE JURY AS TO THE DEFENSES OF FRAUD OR CONCEALMENT RELATING TO APPELLEE'S KNOWLEDGE OF FIRE'S ORIGIN (Proposed Instruction No. 24).

Appellant's Proposed Instruction No. 24 read (32):

"Burden of Proving Concealment, Fraud or Arson.

While the burden of proving concealment, misrepresentation or fraud on the part of the plaintiff to void such policy is upon the defendant, the

law does not require demonstration, that is, such degree of proof as, excluding possibility of error, produces absolute certainty, because such proof is rarely possible, as concealment, misrepresentation, or fraud are usually planned and executed with stealth and secrecy. In a civil action it is proper to find that defendant has succeeded in carrying its burden of proof on the issue of concealment, misrepresentation or fraud if the evidence favoring their side of the question is more convincing than that tending to support the contrary side, and if it causes you to believe that on that issue the probability of truth favors the defendant.

Concealment, misrepresentation or fraud as to the origin of a fire is provable by circumstantial evidence, that is, by inference reasonably deducible from facts proven, and this is so because the law recognizes the intrinsic difficulty of establishing such a concealment, misrepresentation or fraud by direct evidence, as a person who sets a fire to a building usually plans and executes his plan with stealth and secrecy. Consequently all of the circumstances preceding and surrounding the origin of the fire of June 25, 1956, as well as the aftermath to the fire, may be considered by you in determining whether plaintiff has wilfully concealed, misrepresented or committed any fraud concerning this fire."

Appellant objected to the failure to instruct on such subjects by calling the omissions to the Court's attention at the close of the instructions (597):

". . . Instruction number twenty-four, relating to the use of circumstantial evidence in fraud,

misrepresentation and the concealment. I believe that covers each of the matters that I have in mind, your Honor . . ." (597)

A. Failure to instruct jury as to whether fraud of employee imputable to employer.

Later, during its deliberations, the jury requested the Court . . . "further instructions on the term 'Fraud' in relation to employer and employee."; and the jury amplified such request by the following statement (598-600):

> "Is employer responsible for possible misstatements or fraud of an employee on his statement or document if the employer signs the document?" (600)

The Court replied to the jury that, the interrogatory related to an abstract question of law and he was unable to answer it. No further objection was made to the Court's refusal to instruct on the subject of fraud, because the Court did not give Counsel an opportunity to object (600-601):

> "The Court. Members of the jury, with respect to the inquiry which you have made, 'Is employer responsible for possible misstatement or fraud of employee on a statement or document if the employer signs the document,' I must say to you that I am unable to answer that question. That is an abstract question of law and it could not be answered by any Judge in my opinion without reference to the particular facts and circumstances. I do not know what the jury has in mind with respect to the matter, and I will go no further than to say that the Court is

unable to give you any advice on an abstract principle of law, because there may be a dozen cases in which there might be responsibility and there might be another dozen cases in which there might not be responsibility. Each case would stand or fall on its own, and I am not in a position to give you an instruction on some abstract principal of law such as that. You will have to work out your conclusion on the basis of the instructions which I have heretofore given you."

XII. IN FAILING TO INSTRUCT THE JURY AS TO APPELLEE'S DUTY TO COMPLY WITH THE POLICY REQUIREMENTS AND APPELLANT'S RIGHT TO EXAMINATION UNDER OATH (Proposed Instructions Nos. 3, 5 and 4).

Appellant's proposed instruction No. 3 read (24):

"Compliance With Conditions Precedent Required

The standard California fire insurance policy provides that:

'No suit or action on this policy for the recovery of any claim shall be sustainable in any court of law or equity unless all the requirements of this policy will have been complied with, * * *'

In its answer, defendant has set forth that plaintiff did not comply with the following requirements of the standard California fire insurance policy in that such policy provides as follows:

'The insured, as often as may be reasonably required shall exhibit to any person designated by this company all that remains of any property herein described, and submit to examinations under oath by any person named by this com-

pany, and subscribe the same; and, as often as may be reasonably required, shall produce for examination all books of account, bills, invoices and other vouchers, or certified copies thereof if originals be lost, at such reasonable time and place as may be designated by this company or its representatives, and shall permit extracts and copies thereof to be made.'

When an insured has failed to comply with the requirements of the policy which require him to produce said bills, invoices and other vouchers, or copies thereof if the originals be lost or fail to submit to an examination under oath, the failure either to produce such documents or submit to such Examination Under Oath constitutes a complete defense to any action on the policy. . . . Authorities cited. . . ."

Appellant's proposed instruction No. 5 read (26):

"Meaning of 'Shall'

As used in the Insurance Code of the State of California, and in the parts of the policy that are hereafter read to you in my instructions, the word 'shall' is mandatory unless otherwise apparent from the context. . . . Authorities cited. . . ."

Appellant's proposed instruction No. 4 read (25-26):

"Burden of Proof

An insurer is not liable except upon proof that the loss has occurred within the terms of the policy and the burden of proof is upon the insured to prove that he has performed the conditions of the policy. . . . Authorities cited. . . ."

The following objection to the failure to instruct on such subjects was made (596):

of the fire, the failure to produce books and records, the incendiary fire and the conspiracy to defraud Appellant by setting the fire and filing and swearing to a false proof of loss.

While there is real evidence as to what was used to cause the fire and its rapid spread, there is no direct evidence showing the exact method by which the fire was started, but these circumstances show the fire was of incendiary origin: it originated at floor level inside a locked building in a stock storage room, where the floor showed evidence of inflammable fluid having been applied to the floor; and the firemen found an open container with an odor of diesel fluid there, as well as a gasoline drum with a pump loosely affixed, permitting fumes to escape. This storage room was not normally used to store either diesel or gasoline. Also, containers and a rag were found in lumber debris, where they would not ordinarily be placed. H. D. Jensen was alone in the building approximately 10-12 minutes before the fire was discovered; and he was observed fleeing from the building after the fire originated and before the alarm sounded at 12:21 P.M.

A false Proof of Loss was executed by Appellee claiming he had no knowledge of the origin of the fire and grossly exaggerating inventory and the "out of sight" loss. Employees familiar with the storage area contradicted Appellee.

Appellee and H. D. Jensen had a financial motive to conspire to defraud Appellant. The Court excluded evidence offered to show financial motive such as

creditors pressing for payments on delinquent accounts, dishonored checks, and the general inability to meet current obligations of the business.

The conspiracy to defraud Appellant by setting said fire and filing said Proof of Loss was shown by the relationships of Appellee and H. D. Jensen, the acts done by them, the circumstances surrounding the fire, the Proof of Loss, and the failure to produce invoices or submit H. D. Jensen to an Examination Under Oath.

Appellee breached conditions of the policy when he declined to produce books, invoices, or copies thereof, and to submit H. D. Jensen to an Examination Under Oath. Proper written requests were made for the production of such books, invoices and the examination of H. D. Jensen, but the requests were not met.

Appellant's Motions for a directed verdict and Judgment N.O.V. on the ground that Appellee had not complied with the policy conditions should have been granted, because the burden was upon Appellee to prove that he complied with the conditions of the policy, which he did not do.

Appellant's motion, in the alternative, for a new trial should have been granted because of the substantial evidence showing the origin of the fire was incendiary and connecting H. D. Jensen and Appellee to such origin, the erroneous rulings on the admission of evidence relating to motive, hearsay testimony and secondary evidence, compliance with the requirements of the policy, the erroneous instructions on the burden of proof on Appellant and the refusal to instruct

the Jury on the issues of fraud, concealment, incendiary fire, conspiracy and the requirements of the policy.

ARGUMENT.

I. CALIFORNIA RULE OF LAW APPLICABLE.

In diversity of citizenship cases involving an insurance policy, questions of burden of proof, presumptions, sufficiency of evidence and the interpretation of rights and obligations under a policy are matters of substantive law in which it is the duty of the trial Court to apply the State rule,

Erie Railroad Co. v. Tompkins (1938), 304 U.S. 64, 58 S. Ct. 817, 82 L. Ed. 1188;

Palmer v. Hoffman (1943), 318 U.S. 109, 63 S. Ct. 477, 87 L. Ed. 645;

Van Meter v. Franklin Fire Ins. Co. (1947 Cr. 9), 164 F. (2d) 325;

Hyland v. Miller Nat. Ins. Co. (1947 Cr. 9), 91 F. 2d 735, 737.

A. California Rule on Motions for Directed Verdict and Judgment Non Obstante Veredicto.

Since taking the issues of fraud, concealment, conspiracy to defraud by a false proof of loss or an incendiary fire from the Jury was, in effect, a directed verdict on such issues for Appellee and third party defendant H. D. Jensen, (See: *Umsted v. Scofield Eng. Const. Co.* (1928), 203 Cal. 224, 226, 263 P. 799) the following principles recognized by California in determining whether motions for directed verdict are applicable:

(a) "Unless it can be said that, as a matter of law, no other reasonable conclusion was legally deductible from the evidence, and that any other holding would be so lacking in evidentiary support that an appellate court would be impelled to reverse it upon appeal, or a trial court to set it aside, it must be held that the court erred in taking the case from the jury and itself rendering the decision." (p. 228.)

Umsted v. Scofield Eng. Const. Co. (1928), 203 Cal. 224, 226, 228, 263 Pac. 799.

(b) In *Singleton v. Hartford Fire Ins. Co.* (1930), 105 Cal.App. 320, 326, 287 P. 529, the Court stated: "The foregoing state of the record conclusively indicates that the issues as to the cause of the fire and respecting the alleged fraudulent misrepresentation as to the personal property which was claimed to have been destroyed by fire, should have been submitted to the jury. The liability of the insurance company depended upon the solution of these questions.

A direction to the jury to render a verdict on a question of fact, where there is substantial evidence to justify a contrary decision thereon, is an invasion of the province of the jury and in conflict with the constitutional inhibition against a trial judge charging the jury on matters of fact. (24 Cal. Jur. 916, sec. 164; Umsted v. Scofield Eng. Const. Co., 203 Cal. 224 (263 P. 799).) Upon a motion for a directed verdict every reasonable inference made from the evidence should be resolved in favor of the party against whom the application is made. When reasonable minds may differ as to the effect of the evidence upon

the solution of an issue of fact, the application to direct a verdict should be denied. (Boyle v. Coast Imp. Co., 27 Cal. App. 714 (151 P. 25); Robertson v. Weingart, 91 Cal. App. 715, 726 (267 Pac. 741); 33 C.J. 130, sec. 863.) From time immemorial the courts have jealously guarded the rights of juries to pass upon facts. An application to direct a verdict upon facts should be granted with caution and only when it is clear there is no substantial evidence to support a contrary finding. In the present case it may not reasonably be said there is no substantial evidence to support the appellant's contentions that (1) the fire was of incendiary origin and, (2) false statements of the property alleged to have been lost were wilfully made. These were questions for the jury to determine. This evidence was material.

Under the provisions of the policy in the present case, wilful destruction of the property on the part of the insured, or wilful and false statements made by him on his proof of loss with intent to defraud the insurance company, will totally avoid the policy and relieve the insurer from all liability thereunder. (Pedrotti v. American Nat. Fire Ins. Co., 90 Cal. App. 668 (266 Pac. 376); 33 C.J. 19, sec. 667; 6 Cooley's Briefs on Insurance, p. 4938; 7 Cooley's Briefs on Insurance, p. 5858.)

The judgment is reversed." (P. 326.)

B. Fraud, Conspiracy to Defraud by an Incendiary Fire or False Proof Are Provable by Circumstantial Evidence.

In a civil action, a conspiracy, fraud or an incendiary fire is each provable by circumstantial evidence:

(1) Incendiary fire:

People v. Hays (1950), 101 C.A.2d 305, 311, 225 P.2d 600;

People v. Freeman (1955), 135 C.A.2d 11, 15, 286 P.2d 565;

People v. Kessler (1944), 62 C.A.2d 817, 823, 145 P.2d 656.

(2) Conspiracy to defraud:

Johnstone v. Morris (1930), 210 Cal. 580, 590, 292 P. 970;

Dandim v. Dandim (1953), 120 C.A.2d 211, 214, 260 P.2d 1033.

(3) Fraud:

Newman v. Fireman's Ins. Co. (1944), 67 C.A. 2d 386, 399, 154 P.2d 451;

Bohn v. Watson (1954), 130 C.A.2d 24, 33, 278 P.2d 454;

Stevens v. Curtis (1953), 122 C.A.2d 30, 35, 264 P.2d 606.

While the burden of proving such defenses is on the insurance company, it does not have to be proved beyond "reasonable doubt" as required in a criminal prosecution; but the insurance company has met its burden when any of said defenses is established by a preponderance of the evidence, because it is a civil case.

Sec. 2061 (5), C.C.P.;

Treadwell v. Nickel (1924), 194 Cal. 243, 260, 228 P. 25;

Singleton v. Hartford Ins. Co. (1930), 105 Cal. App. 320, 326, 287 P. 529.

II. EVIDENCE WAS LEGALLY SUFFICIENT TO ESTABLISH INCENDIARY FIRE.

Shortly, before 12:21 P.M., on Monday, June 25, 1956, a fire occurred inside a two story frame building, occupied by Eureka Lumber Company, at the NW corner of Third and Commercial Streets, Eureka, California, damaging certain personal property (407-8, Ex. "A", 49, 431).

A. Description of Building.

It fronted 92 feet from east to west along the north side of 3rd Street; and it was 100 feet long from south to north. The west ½ of the building was an open shed area with a dirt floor. The east ½ had a wood floor, four main rooms on the first floor and a second floor office and storage rooms (411). A wood partition, extending from the ground to the roof separated said West and East ½s of the building (Ex. "A" 431, 166). West of the building was an open storage yard extending to Broadway (80).

The four rooms on the first floor (designated Southeast, "SE"; Southwest, "SW"; Northwest "NW"; and Northeast "NE", respectively) each was approximately 20′ wide from East to West. The SE room was an office, and a display and retail sales area with shelving along the east and west walls (Photos Ex. G, V, W, P; 413-416, 102); at its East wall, a loading door marked "II" on Diagram Ex. "A", opened onto Commercial Street (Photo Ex. "O", 379-380); at its north wall, a door opened into the NE room, which was a storage room (Photo Ex. "F", 416,

101). At the north end of the NE room, door marked "III" on Ex. "A", opened into an alley (240, 410). The SW room was a storage area; in it north wall, a door opened into the NW room, where a Kaiser automobile was kept (Ex. "A", 439, 100). At the north end of the NW room, a door marked "IV" on Ex. "A" opened into said alley (241).

There was one front door to said East ½ of the building, and it was marked "I" on Ex. "A" (240). From 3rd Street, the front door opened onto a landing leading to the SE room on the east and to the SW room and a wooden stairway leading to the 2nd floor on the west.

There was no door between the first floor NE and NW rooms or the SE and SW rooms (Ex. "A" Diagram), but in the partition dividing the building in ½, a door, marked "V" on Ex. "A", opened from the SW room into the West ½ of the building (241).

All the outside doors marked II to V, inclusive, in said East ½ of the building, were locked from the inside of the building, but front door marked "I" opening onto 3rd Street had an outside lock (239-241).

The West ½ of the building was open from the dirt floor to the corrugated roof, which was supported by exterior walls, open wood trusses supported by approximately eight 6x6" wood columns (Diagram Ex. "A", 392). At the north wall of said West ½ of the building, two open doorways led into said alley, and at the south wall two open doorways led into 3rd Street.

The total dirt floor area was approximately 2,300 sq. feet (46′x50′) (Ex. "A" Diagram).

B. Description of Contents of West ½ of Building.

In the southeast section of the West ½ of the building, there was a portable sawmill with a Diesel engine, but it was not operated as a sawmill (150). The sawmill was approximately 40′ long, extending from the easterly open front doorway north along said dividing partition (Ex. "C", 149, 145; Ex. "D", "AC", 506-7). The sawmill was movable on tracks set on 12 x 12″ logs with a log bumper at the north and south end of the tracks (145, 147). There was approximately a 4 to 5′ space between the east edge of the mill and said dividing partition (512 Ex. "AC", "AT").

On the west side of the mill and midway between the bumpers the Diesel engine extended westerly from the mill (Ex. "C", "D" and "AC"; Diagram Ex. "A").

Two days before the fire, James Ragsdale moved a sawmill, which he had been constructing for several weeks, out of the southwest section of the West ½ of the building (86, 355, 370).

Appellee claimed and testified that at the time of the fire, and for more than a month prior thereto, 66,000 board feet of redwood molding and window casings and 35,000 board feet of fence board were stacked in the following areas in the West ½ of the building:

(1) Along the west wall, from the area used by Ragsdale to the Northwest doorway, extending

out from the west wall 6 to 8 feet at an unknown height (143, marked Redwood on Ex. "A");

(2) Along the east wall between the portable sawmill and the dividing partition of the building; and, from the north bumper of the portable sawmill to the north wall of the building;

(3) On top of a platform of the portable sawmill.

Such areas are marked X^1 to X^7 on Ex. "A" (142-145, 150-162).[6]

C. Point of Origin of the Fire Was at the Floor Level of the SW Room.

The fire originated in the northerly portion of the SW room at floor level, where deep seated charring of the floor showed that an inflammable liquid had been poured on the floor (431-432, 445-448).

(1) *Neal A. Jensen,*[7] who worked for the Company before and after the fire (393), was in the front ground floor office of Louis H. Hess at the northeast corner of 3rd and Commercial Streets, when he heard an explosion; and, looking out of the west windows of the Hess office, he saw a volume of smoke coming out of the Eureka Lumber Company building. Immediately, he ran to the front door marked "I" of the Company but could not enter because it was locked (394, Ex. T, 397-9). He entered the front opening in the west ½ of the building, and proceeded to the

[6]Other employees contradicted Appellee: John Roberts (2000 bd. ft.) (355 to 357, 360); John E. Wilson (368, 370-371); Ellen Van Harpen (485, 492-494, 504-505).

[7]He is not related to Appellee.

back end of said portable sawmill to position "J" on Diagram Ex. "A". There was no fire west of the partition dividing the east and west ½s of the building, but all the fire was east of such partition in the southwest room (400-402). Neal A. Jensen hurried back to the Hess office to inquire about the fire department, then returned to the subject building and entered the westerly front door, to a point half way back in the west ½ of the building. At this time the fire was breaking through the dividing partition at the floor and along the roof levels (402-3, Photo Ex. "AD").

(2) After the loading door ("II") (Ex. "O") in the east wall of the first floor southeast room was forced open, *Fireman Orlen Howard* entered said southeast room and observed fire burning through the westerly wall of said southeast room, just below ceiling level at H' Diagram Ex. "A" from the SW room, and little spot fires were in the ceiling of SE room (Ex. "P"). Then Howard proceeded southerly to the front of the office in the SW room (Photo Ex. "G") (376, 379-381).

(3) After the north door (III) in the NE room first floor was forced open, *Fireman Harold McBeth* entered the NE room, which was filled with smoke, and proceeded to a ladder in the southwest corner of the room. He climbed the ladder and found flames in the second floor office which were put out. The fire was coming from the 1st floor SW room (406, 410-12).

After the fire was out, Fireman Harold McBeth examined the entire premises to determine the point

of origin. In his opinion, it originated in the first floor southwest room at the wooden floor level in the northerly portion of the room area marked M^{1-2} on Diagram Ex. "A", where said deep seated charring of the flooring showed an inflammable liquid had been poured on the floor (431-2; 445-8). From this area the fire spread into said West ½ of the building and the second story of the building (433-7, Photos Ex. P, AD to AI, inclusive).

No evidence was offered to show the fire did not originate at or originated at a point other than the floor area of the SW room.

D. Finding of a Criminal Agent at Point of Origin Is Evidence of Incendiary Fire.

The presence of diesel fluid at the point of origin of a fire is sufficient to establish a fire is of incendiary origin.

In:

People v. Gilyard (1933), 134 C.A. 184, 189, 25 P.2d 35,

the Court pointed out:

> "A jar of earth, taken by the police from beneath the partially burned house and giving forth the odor of kerosene, was admitted in evidence. There was no error here, as this real evidence tended to prove that the fire was of incendiary origin."

In:

People v. Kasparoff (1928), 94 C.A. 7, 9-10, 270 P. 398,

a partially burned rug had kerosene odor.

1. Not Necessary to Show Exact Method by Which Fire Started.

It is not necessary to establish the exact method by which the fire was started,

People v. Hays, 101 C.A.2d 305, 311, 225 P.2d 600;

People v. Maas (1956), 145 C.A.2d 69, 75, 301 P.2d 894.

E. Evidence of Use of Liquid Inflammables to Cause Fire Found at Point of Origin.

Although he testified that he could not state his opinion as to the cause of the fire (443), Fireman McBeth found at the point of origin in said first floor SW room an open 5 gal. container with odors of diesel fluid in it, a 50 gal. drum of gasoline with its pump loosely affixed (440), and physical evidence that inflammable fuel had been added to the floor, where the fire started (445-446). Also, in the same area were squares of asphalt roofing shingles and plywood (101).

There were no natural sources of fire, such as heating devices (445); or any electric wiring at said point of origin.

No evidence was offered by Appellee or Third Party Defendant H. D. Jensen to account for or to explain the presence of such an open diesel fluid container or such a loosely affixed pump in this area used to store said shingles or plywood.

Therefore, the jury was entitled to infer that such diesel fluid was used to cause the fire and gasoline fumes allowed to escape to contribute to the rapid spread of the fire.

F. Evidence of the Use of Liquid Inflammables Was Found and Present in Area of Lumber Debris.

Containers with inflammable diesel liquids had been placed in the area where Appellee has testified redwood molding was stacked in the area of the sawmill (167, Diagram Ex. "A", 142-145, 150-162). Fireman Alfred Breen cut a hole in the west wall of the building, about ⅓ of the way from Third Street (Photo Ex. "Q", "R"). He proceeded to the area at the north end of the sawmill, where he found a "Stubborn" fire in a wood pile, which he had difficulty in extinguishing. In fighting the "stubborn fire" he smelled odors of petroleum products (384, 386-7).

In examining this same area adjacent to the sawmill after the fire, Fireman Harold McBeth found a one gal. open top container in such wood debris and another one gal. open top can at M^5 on Diagram Ex. "A", which contained a burnt rag with odors of diesel (418-420, 437-439, Photo Ex. Z, "AA", "AJ").

No evidence was offered by Appellee or Third Party Defendant H. D. Jensen to account for or explain the presence of such open diesel fluid containers and the rag in an area stacked with molding.

G. Appellee Told Fireman It Was Set Fire.

At the scene of the fire, Appellee told Fireman McBeth that "I think somebody set it afire." (114).

III. EVIDENCE WAS LEGALLY SUFFICIENT TO ESTABLISH H. D. JENSEN SET THE FIRE.

The identity of the person or persons who caused the fire may be proved by circumstantial evidence such as proof of motive and conduct which tends to connect the person or persons to the origin of the fire,

People v. Hays (1950), 101 C.A.2d 305, 311, 225 P.2d 600.

A. H. D. Jensen Had the Opportunity to Set the Fire.

On the morning before the fire, H. D. Jensen was in the immediate area of the point of origin twice. He drew a ½ gallon of gasoline in a service station can from the 50 gallon gasoline drum in the SW room, and placed the gasoline in his 8 year old son's car in front of the building and left the can in the back of the car (526-528). Also, Bookkeeper Ellen Van Harpen called him from the SW and Kaiser rooms during the morning (495).

The only employees at the building the morning of the fire were Ellen Van Harpen, Appellee and H. D. Jensen. Although other employees reported to work, they were told there was no work (370, 494, 528).

After Appellee left for lunch with H. D. Jensen's son, Ellen Van Harpen and H. D. Jensen were the only persons left at the building; and, when Ellen Van Harpen left for lunch at 12:05 p.m., H. D. Jensen was the only person in the building (495, 245); and, he remained alone in the building with access to the SW room until shortly before the explosion was heard (529, 532, 261).

No evidence was offered by Appellee that H. D. Jensen did not have an opportunity to set the fire.

B. The Building Was Locked Up by H. D. Jensen.

There were three keys to the front door, one each held by Appellee, Ellen Van Harpen, and H. D. Jensen (239-240, 532).

All the doors (marked II to V, inclusive on Ex. "A") in the East ½ of the building had inside locking devices and were locked from the inside at the time of the fire. Referring to the door marked "V" in said dividing partition, Appellee stated: there was generally "quite a pile of lumber and stuff piled against that one door" (242). The front door marked "I" Ex. "A" (240-243, 529-533), was locked by H. D. Jensen when he left (532), and it was still locked when the fire was discovered (399). The fire department forced its way in through other doors (379, 411).

The fact that a person locked up the building prior to the fire and the fire department had to force an entry into the building to fight the fire has been held to be material evidence to connect such person with setting the fire,

People v. Becher (1949), 94 C.A.2d 434, 441, 210 P.2d 871;

People v. Kessler (1944), 62 C.A.2d 817, 823; 145 P.2d 656.

There was no evidence to establish that anyone entered the building between the time H. D. Jensen locked the front door of the building and when he was seen by Percy L. Musser fleeing the scene of the fire.

C. Flight of H. D. Jensen From the Scene of the Fire Immediately Before the Fire Was Discovered.

Where a person flees from the scene of a fire, a Jury may infer that such person was conscious of some guilt or responsibility for the fire,

See:

Brooks v. E. J. Willig Truck Transportation Co. (1953), 40 Cal.2d 669, 676, 255 P.2d 802.

H. D. Jensen was observed as he fled from the building.

On the Monday morning of the fire, the only persons working at the Company were Ellen Van Harpen, who had been the bookkeeper for one year and handled retail sales (528, 494, 195, 222), H. D. Jensen and Appellee. Other employees reported to work the morning of the fire (370), but were not put to work. H. D. Jensen's 8 year old son and a companion were at the premises. About 12:05 P.M.,[8] H. D. Jensen had Appellee take the two boys out for lunch (113, 244). Ellen Van Harpen testified that at 12:05 P.M. she and H. D. Jensen were the only persons in the building; then, she left H. D. Jensen in the 1st floor office SE room, and went out to lunch, leaving him alone in the building. She drove her car one block to the Blue Ox Cafe, seated herself in the cafe and had ordered her lunch when she heard the fire trucks going by (494-6).

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[8]After the fire Appellee told Fireman Harold McBeth that he left at 11:40 A.M., and H. D. Jensen told McBeth that he left the building between 5 to and 5 after 12 (429).

1. *Percy L. Musser,* who operates a motor transportation business at the southeast corner of 3rd and Broadway Streets, was in his office (Photo Ex. "C"), when he heard an explosion. Immediately afterwards, Musser saw H. D. Jensen driving West from the direction of the subject building on 3rd Street "very fast"; Jensen cut the corner and drove over some concrete at the corner of Musser's property and came to a sudden stop; quickly Jensen opened and closed his pickup door, spun his tires around and drove south on Broadway away from the fire. With an unobstructed view out of his window, Musser saw fire at the peak of the roof of the subject building, where the centre wall (dividing partition) goes through, marked "1", on Photo Ex. "L". Then Musser telephoned the fire department, because no alarm had sounded (258-264).

The fire alarm was received at 12:21 P.M. (408, Ex. "U").

Under cross-examination, H. D. Jensen admitted that he was at the building until about 12:15 P.M. (529).

D. H. D. Jensen and Appellee Made Inconsistent Statements.

Inconsistent statements by a person have been held to show a consciousness of guilt,

People v. Hays (1950), 101 C.A.2d 305, 311, 225 P.2d 600.

Among the inconsistent or contradictory statements made by Appellee and H. D. Jensen as to material points are: Following the fire in the presence of each

other, H. D. Jensen told Fireman Harold McBeth that he left the building between 5 to 12 noon and 12:05 p.m., and Appellee stated he left the building at 11:40 A.M. (429). Later, Appellee said he left about 12:05 P.M. (113, 244) and H. D. Jensen said he left about 12:15 p.m. (529). Also, as to the time and origin of the fire Appellee changed his statement from "12 noon" (Ex. K) and "I think somebody set it afire" (114) to an unknown time and origin (245-246).

Therefore, from the conduct and inconsistent statements of H. D. Jensen and Appellee the Jury was entitled to infer that H. D. Jensen and Appellee were conscious of some guilt for this fire.

E. H. D. Jensen Had a Motive to Set the Fire.

The evidence establishing a financial motive on the part of H. D. Jensen is set forth in the following Section V—Re: Motive.

IV. EVIDENCE LEGALLY SUFFICIENT TO ESTABLISH A CONSPIRACY BETWEEN H. D. JENSEN AND APPELLEE.

A conspiracy is inferrable from the nature of the acts done, the relations of the parties, the interest of the alleged conspirators and generally all of the circumstances preceding and attending the culmination of the claimed conspiracy,

Siemon v. Finkle (1923), 190 Cal. 611, 615, 213 P. 954;

James v. Herbert (1957), 149 C.A.2d 741, 747, 309 P.2d 91.

It is not necessary to establish a formal agreement, *Siemon v. Finkle,* supra. Fraudulent designs and conspiracies may be established without any direct proof,

McPhetridge v. Smith (1929), 101 C.A. 122, 142, 281 P. 419.

The jury has the right to reject the direct testimony of the conspirators,

Johnstone v. Morris (1930), 210 Cal. 580, 590, 292 P. 970.

The relationship of Appellee and H. D. Jensen, the acts done by them, the circumstances surrounding the fire, proof of loss, and the refusal to produce books and invoices and H. D. Jensen for examination under oath establish a conspiracy to defraud.

Appellee and H. D. Jensen were father and son. H. D. Jensen made his home at Appellee's house at 2434 E Street, Eureka, for more than 1 year prior to the fire, although he had an eight year old son (232-233, 77, 282, 288). Between 1950 to 1953, H. D. Jensen operated a small saw mill on the Hansen Road near Eureka, which he leased from Appellee, and Appellee worked with or for H. D. Jensen as an employee (225, 226). During such operation, H. D. Jensen acquired liabilities of $133,315.41, and some assets, including an account receivable from the Alert Lumber Company,[9] and such liabilities were outstanding when

[9]The Court is requested to take Judicial Notice that on October 13, 1955, in the U. S. Dist. Ct. Northern Dist. of Calif., Bankruptcy No. 15035, H. D. Jensen filed a voluntary petition in bankruptcy with liabilities of $133,315.41 incurred during said mill operation;

such mill was traded to Grover Cable for the Eureka Lumber Company business. The trade was evidenced in a document executed by H. D. Jensen, Appellee and Cable (227-229 Ex. J for Iden.). Cable conducted his Eureka Lumber Company business through the Alert Lumber Company, Inc. (283); the Alert Lumber Company was indebted to H. D. Jensen at the time of the trade, and at the time of H. D. Jensen's bankruptcy, the indebtedness was still approximately $50,000.00 (Bankruptcy Petition).

Following the trade, H. D. Jensen arranged for the purchase of real property, where the business was conducted, from Anna Hess. The deed was taken in Appellee's name (231). Printed letterheads of the Eureka Lumber Company showed H. D. Jensen to be its Sales Manager and Appellee its General Manager (230). During the 2½ years the business was operated prior to the fire, Appellee worked primarily in the yard, handling the re-manufacture, transferring and loading of lumber (82). H. D. Jensen handled the books of account, sales, finances of the Company (137), determined when the accounts payable were to be paid (230-231), "bought a lot of the lumber" (230), arranged for the fire insurance (61), opened a bank account in his own name in which deposits were made from Appellee's account allegedly for

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assets of $54,975.00 including accounts receivable from Alert Lumber Co. of $50,000.00,

Lopez v. Senope (1953 Cr. 9), 205 F.2d 8, 9;

Wells Fargo Bank & Union Trust Co. v. McDuffie (1937 Cr. 9), 88 F.2d 382, 384.

See:

Pailhe v. Pailhe (1952), 113 C.A.2d 53, 66, 247 P.2d 838.

lumber purchased by H. D. Jensen for the Company (233, 559); although demanded, no supporting invoices were ever produced (559-560), and such account was opened after H. D. Jensen's adjudication in bankruptcy. Thereafter, many of the Company's deposits were made in H. D. Jensen's account, and overdrafts were developing in Appellee's account. H. D. Jensen also prepared and furnished for Appellee's execution financial statements, including the financial statement of June 1, 1956, to the Crocker-Anglo Bank (Ex. 17 and 18, "AY" 195, 198, 201), wherein they substantially understated liabilities and overstated accounts receivable. H. D. Jensen ran his personal business through the Company (234).

On the morning of the fire other employees reported to work, but they were sent away by Appellee and H. D. Jensen and did not work (370, 494, 528). Around 12 noon Appellee took H. D. Jensen's son and playmate to lunch, leaving H. D. Jensen free to set the fire; after the fire, Appellee stated he left the premises at 11:40 A.M. and H. D. Jensen stated he left between five to 12 and 12:5 (429). Later, the departure time was put back to 12:05 P.M. and 12:15 P.M. respectively (113, 244, 529), and the time of the origin of the fire was changed from "12 noon" to a "I don't know" (245-248, Ex. "K").

Following the fire, H. D. Jensen furnished the information for the Proof of Loss and checked it before Appellee subscribed to it (135, 270, 525-526). Under oath on October 12, 1956, Appellee testified that he had no knowledge of the records of the Company or

whether any of the books were destroyed in the fire (223); further, he stated that he couldn't say how much merchandise there was in the fire (224). Counsel for Appellee received written notice to Appellee and H. D. Jensen for the respective examinations under oath (Ex. H, 204-5). Appellee's counsel told Appellee he was to be examined under oath and he told H. D. Jensen that he was to be examined under oath. Appellee appeared but H. D. Jensen did not. At the time scheduled for H. D. Jensen to appear for such Examination, Appellant offered to prove that Appellee sent H. D. Jensen out of Eureka (210, 217). At the time of the fire, the Company had a complete set of books and invoices which were not destroyed in the fire (221, 486, 485-492). Immediately, after the fire, H. D. Jensen took care of all the records and inventory of the Company (237-238), including the accounts receivable book (572-5). Appellant made written requests to the Company, Appellee and H. D. Jensen to exhibit the complete books and invoices to Russell M. Stearns, a C.P.A., but material records and invoices were not exhibited to Stearns (Ex. AU, 545, 547-8, 550; Ex. H; Ex. AV, 549-550).

After the fire, H. D. Jensen operated business under the name of Eureka Lumber Company (235), and Appellee sought to transfer trucks of the Company to H. D. Jensen (235-6).[10]

Also, the Jury was entitled to consider the circumstances surrounding the fire as evidence bearing on

[10]Witness Hanna (522) would have testified the trucks were voluntarily transferred to H. D. Jensen by Appellee (Ex. AP for Identif.—523).

the fraud, concealment and conspiracy. In *Orenstein v. Star Ins. Co.* (1926 Cr. 4th), 10 F.2d 754, 757, the Court pointed out:

> "It appeared that this estimate of value was grossly excessive, and the circumstances surrounding the fire were such as to warrant the conclusion that it was wilfully false and fraudulent."

Or, as stated by this Court in *Hyland v. Millers Nat. Ins. Co.* (1937 Cr. 9th), 91 Fed.2d 735, 744:

> "Furthermore, Hyland's credibility is seriously weakened . . . by the fact that he told the insurance companies in his proofs of loss that he had no knowledge or belief as to the origin of the fire, when there is ample evidence he was well aware of its incendiary origin."

V. APPELLEE AND H. D. JENSEN HAD A FINANCIAL MOTIVE TO DEFRAUD, CONCEAL, AND ENTER INTO A CONSPIRACY TO DEFRAUD APPELLANT BY SETTING THE FIRE AND PRESENTING A FALSE PROOF OF LOSS.

A. Evidence of Financial Condition Admissible to Establish Motive, and to Connect Party With Incendiary Fire.

Financial condition is admissible to show that a person has a motive to set a fire,

People v. Freeman (1955), 135 C.A.2d 11, 14, 286 P.2d 565—heavily in debt;

People v. Richard (1951), 101 C.A.2d 631, 637, 225 P.2d 938—business not a paying proposition;

People v. Sherman (1950), 97 C.A.2d 245, 249, 217 P.2d 715—indebted for rent;

or to connect Appellee and H. D. Jensen with the fraud, concealment, conspiracy or incendiary fire,

> *People v. Hays* (1950), 101 C.A.2d 305, 311, 225 P.2d 600.

The fact that such financial condition is prejudicial to a person does not make evidence of financial condition inadmissible,

> *People v. O'Brand* (1949), 92 C.A.2d 752, 754, 207 P.2d 1083;

nor does the fact that it may discreditably reflect on him,

> *People v. Soeder* (1906), 150 Cal. 12, 15, 87 P. 1016;
>
> *People v. Weston* (1915), 169 Cal. 393, 397, 146 P. 871.

As pointed out in *People v. Richard,* supra:

> "in cases where circumstantial evidence is largely relied upon for conviction . . . then *motive* becomes a *matter of earnest inquiry.*" (Emphasis supplied.)

B. Their Poor Financial Condition Established by Evidence.

Appellee and H. D. Jensen had a financial motive to enter into a conspiracy to defraud Appellant by setting the fire and presenting a false proof of loss. While some evidence of their poor financial condition was admitted in evidence, other material evidence was excluded by the trial court's rulings. In the fall of 1955, a slump developed in the Company's business, which slump continued through the fire on June 25, 1956—it was worse at the time of the fire (225). In

the fall of 1955, H. D. Jensen was adjudicated bankrupt (232).

On June 22, 1956, an attachment closed the bank account of Appellee (202).

Salaries of employees John Roberts, Ellen Van Harpen and John E. Wilson were not met at the time of the fire, and, early in June, Appellee had asked an extension of time from employee John Roberts (180, 181, 362, 373, 486). More than $800.00 was owed the Western Door & Sash Company (280); and, about $1300.00 was payable to Rice Supply Company (315). The Company was H. D. Jensen's principal source of income (234), and at the time of the fire he was indebted to Appellee (232). For the first six months of 1956, the company's payroll records did not reflect any salary payments to H. D. Jensen or any withholding taxes for him (560). There was no evidence to indicate that following his bankruptcy H. D. Jensen acquired any substantial assets. Up to April 20, 1956, the moneys of the Company were deposited in H. D. Jensen's bank account to keep his checks from bouncing (233).

In the absence of the Court's ruling, Appellant would have proved: Late in 1955, Appellee purchased a home from G. R. Abrahamsen for $37,500.00. After a small down payment, Appellee obtained a loan of $14,000 from the Bank of America, evidenced by a note and trust deed; and Appellee executed a note and second deed of trust to Abrahamsen for $18,624.58, which was payable $5,000 on February 1, 1956, and the $13,624.58 balance on May 2, 1956 (Ex.

"AR" for Iden.). Appellee defaulted on the $13,624.58 payment due Abrahamsen on May 2, 1956, and Abrahamsen called the default to his attention (Ex. "AR" for Iden. 535-6). On June 14, 1956, Appellee furnished said financial statement Ex. 18 to Crocker-Anglo Bank to obtain a loan of $5,000.00,[11] which on June 18 was paid on the delinquent balance to Abrahamsen, leaving the unpaid delinquent balance at $8,624.58. Such financial statement was false in that:

(1) Liabilities of Appellee were greatly understated and accounts receivable overstated (Witness Russell M. Stearns would have testified the liabilities were $169,748.40—not $95,679.00—and receivables were $2,998.32—not $29,404.08).

(2) A piece of property (Freshwater parcel) was listed as owned by Appellee, whereas at the trial he testified it belonged to H. D. Jensen (231).

(3) Appellee's net profit for 1955 was overstated by $20,000.00 (Copy U. S. Tax Return 1955, Ex. "I" Iden.). After April 20, 1956, the average balance in H. D. Jensen's account was less than $100.00 (Witness Russell M. Stearns 559-562); and deposits into H. D. Jensen's account were stopped because of outstanding bad checks against the account (Witness Ellen Van Harpen 502); at the time of the fire and prior thereto, Appellee was unable to meet current obligations of the Company and Appellee's liabilities

[11]While admitting that he may have owed more than said $5,000.00 bank note, Appellee stated he didn't know how much he owed on other notes, or the amount of accounts payable, or if the accounts payable increased during June, 1956 (200-201).

were approximately $169,748.49 (Witness Russell M. Stearns 561). There was an account payable to Lumber Wholesaler of approximately $18,000; and, the morning of the fire a representative of the Northwestern Railroad pressed Appellee and H. D. Jensen to pay a delinquent account of more than $1,000 which H. D. Jensen promised to pay in the afternoon, but there was no money to cover such payment (Witness Ellen Van Harpen 503). Payments due YMAC were delinquent on the truck and trailer (Witness Richard Hanna 523). Since January, 1956, sizeable overdrafts appeared in Appellee's account and sizeable overdrafts continued to appear during each of the following months up to the fire (Witness Russell M. Stearns).

Therefore, there was substantial evidence to support a finding by the Jury that Appellee and H. D. Jensen had a financial motive to defraud, conceal, conspire to defraud, set said fire and file a false proof of loss; and to infer that Appellee and H. D. Jensen were connected with said fraud, concealment and conspiracy.

C. Error to Admit Testimony of Witness A. J. Franceschi Re: Credit Standing.

In the direct examination in the deposition of A. J. Franceschi, Appellee asked the following question relating to credit standing to which Appellant made the following objection which was overruled by the trial court:

> "Q. On June 25th, 1956, what was the credit standing of the Eureka Lumber Company with your bank?

> Mr. Castro. Objected to as irrelevant, incompetent and immaterial, no bearing upon any issue in this case." (Dep. 5.)[12]

and

> "Q. On June 25th, 1956, what was the credit standing of the Eureka Lumber Company with your bank?
>
> Mr. Castro. Objection to that, your Honor, on which we stand.
>
> The Court. I will overrule the objection.
>
> A. As far as we were concerned, it was good." (71.)

The "credit standing" of a Company, in substance a credit reputation with the bank, is inadmissible, because there was no issue before the Court relating to the Company's credit standing or reputation with the bank. Even assuming its credit standing with the bank was good, it would not disprove the fact that Appellee and H. D. Jensen were in poor financial condition—Appellee's account with this bank was closed by an attachment 3 days before the fire (202) and not reopened prior to the fire; H. D. Jensen was adjudicated a bankrupt less than a year before the fire (232) and was dependent on the Company for his income (234). See "VB—Poor Financial Condition Established by Evidence".

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[12]The quotation appeared in the deposition and was read silently by the Court. Appellant requests that the record be supplemented to include such objection.

VI. THE COURT ERRED IN EXCLUDING EVIDENCE OF FINANCIAL CONDITION.

In an opening statement to the Jury, Appellant stated evidence would be offered to establish Appellee and H. D. Jensen had a financial motive to defraud Appellant and to enter into a conspiracy to set the fire and file a false Proof of Loss to defraud Appellant (57).

In his case in chief, Appellee placed in evidence net profit from the Eureka Lumber Company business in 1954 of $5,000.00, but he couldn't recall the net profit for 1955 (128, 129);[13] and statements showing his financial condition as of the close of business on December 31, 1955 (131, Ex. 17) and on June 1, 1956 (131-2, Ex. 18). Appellant's objection to each financial statement on the grounds of hearsay was overruled (131). Such statements were not prepared by Appellee, and he didn't know the amount of notes or accounts payable (195, 200-201). Earlier, the Court overruled Appellant's motion to strike a non-responsive answer of Appellee's witness A. J. Franceschi that, loans had been made to Appellee on an unsecured basis and were always taken care of as agreed (67-68). Over Appellant's objections, Franceschi further testified the Company's credit with the bank was good (71).

Notwithstanding its foregoing rulings, the trial court announced, during the cross-examination of Appellee, that it would not allow Appellant to cross-

[13]Ex. "I" identif., copy of a 1955 U.S. Tax Return of Appellee, reflected it was $19,732.12 (568).

examine Appellee as to his financial condition until some preliminary foundation was laid as to the origin of the fire (203-204).

During the cross-examination of Appellee, the Court refused to allow Appellant to question Appellee as to the amount of money owed at the time of the fire (225); financial background of H. D. Jensen (226); and checks issued by Appellee which were not honored (233).

Later in the trial, when Appellant sought to offer direct evidence of financial condition of Appellee and H. D. Jensen, the Court rejected the evidence stating no foundation had been laid to show a "corpus delicti" (499); and at the court's suggestion Appellee moved to strike said financial statements from the record, (563) which was done, but the rest of the record made by Appellee of his financial condition stayed in the case.

Apart from the evidence listed in section "V(B)—Poor Financial Condition Established by Evidence", above, the Court refused to allow Appellant to prove the financial condition of Appellee and H. D. Jensen. Appellant made offers of proof pointing out such evidence was admissible to show motive to conspire to set the fire or falsify the Proof of Loss (498, 501).

Appellant offered to prove through:

(a) Witness Ellen Van Harpen, the bookkeeper for the Company at the time of and for the past year before the fire, that drawees of checks from H. D. Jensen were holding outstanding ones, because there

were insufficient funds to honor the checks, and no money was deposited in H. D. Jensen's account for several weeks because of such outstanding checks; approximately $18,000.00 was past due Lumber Wholesale Company; the Northwest Railroad Company was pressing to collect more than $1,000.00 past due for freight which H. D. Jensen promised to pay the afternoon of the fire; and there were no funds to make such payment (502-503).

(b) Witness Russell M. Stearns, C.P.A., who made an audit of the financial condition of Appellee, H. D. Jensen and Eureka Lumber Company at Appellant's request, would have testified: the Financial Statement as of June 1, 1956, to the Crocker-Anglo Bank (Ex. Ay) was untrue in that liabilities were $169,748.40—not $95,679.00, and accounts receivable were $2,998.32—not $29,404.08; the dates and amounts of overdrafts during the first six months of 1956; the borrowing of money to satisfy the overdrafts and attachments on the bank account; the relationship between the respective bank accounts of Appellee and H. D. Jensen and shifting of money between them; the average balance of H. D. Jensen's bank account was less than $100.00 after April 20, 1956, through the fire; Appellee and H. D. Jensen were unable to meet current obligations of the Eureka Lumber Company business (561-564).

(c) Witness Richard Hanna, representative of YMAC, which held the finance contract on the truck and trailer, which Eureka Lumber Company was buying from Dayton Murray Truck Sales: that the ac-

count was delinquent at the time of the fire; and after the fire Appellees, voluntarily, transferred such truck to H. D. Jensen who assigned it to Robert Halverson for a consideration (523-524).

(d) Witness G. R. Abrahamson, who sold the dwelling to Appellee, would testify: that the purchase price was $37,500.00, and as a part of the payment, he received appellee's promissory note for $18,624.58, payable $5,000.00 on February 1, 1956, and $13,624.58 on May 2, 1956; after Appellee failed to pay the $13,-624.58 Abrahamsen notified him that it would have to be paid, but the installment was delinquent at the time of the fire except for $5,000.00 paid June 18, 1956 (535, Ex. AR for Iden., pages 3 to 5).

(e) Witness A. J. Franceschi, Manager of Crocker-Anglo Bank at Eureka, would testify: that on the purchase of the dwelling from Abrahamson, Appellee borrowed $14,000.00 from the Bank of America, which was evidenced by a promissory note and first deed of trust recorded in Book 354, Official Records, page 27, Humboldt County Records; that Crocker-Anglo Bank loaned Appellee $5,000.00 on March 1, 1956, and another $5,000.00 on June 18, 1956; series of commercial loans were made to Appellee with the new loan paying off part of the old Loan (536, Dep. A. J. Franceschi, Ex. AS for Iden. pages 4 to 8, 9, 10 and Ex. D attached to his dep.). Also, Franceschi would have testified: attachments were levied on Appellee's bank account on January 5, 1956 for $2,472.00; February 10, 1956

for $530.00; and June 22, 1956 for $2,255.04, when the account was closed out; H. D. Jensen opened a bank account in his name on November 22, 1955, with a deposit of $300.00, which was closed November 25, 1955; and on December 5, 1955, H. D. Jensen opened a bank account in his name with a deposit of $350.00.

At the time the offers of proof were made Appellant had established by the evidence, at least, a prima facie showing of a conspiracy to defraud by setting the fire and filing a false Proof of Loss.

A. Uncontradicted Showing Fire Was of Incendiary Origin.

There was an uncontradicted showing that the fire was of incendiary origin. There was substantial evidence to show that inflammable diesel fluid was used to cause and contribute to the spread of the fire. The charred flooring at the point of origin in the SW room showed evidence of an inflammable fluid being used, an open 5 gal. container with diesel odors was in the area and the pump on a 50 gal. gasoline drum was loosely affixed permitting fumes to escape; and two open 1 gal. containers (one with a partially burned rag), with diesel odors were found in a stack of lumber, which Appellee has described as top grade redwood molding worth from $200 to $280 per thousand. Such containers are not ordinarily kept among the saleable merchandise (see: Argument "II"—"Evidence Legally Sufficient to Establish Incendiary Fire", Sections "C to G".

B. Evidence Showed Proof of Loss Was Fraudulent.

There was substantial evidence that a false Proof of Loss was submitted to Appellant.

(1) Quantity of Stock and Amount of Damage Substantially Exaggerated.

After the fire, Appellee executed a sworn statement in Proof of Loss (Ex. K, 248) for Eureka Lumber Company and filed it with Appellant. It placed the cash value of the total stock at the time of loss at $63,549.34; the whole loss and damage at $33,549.54; and claimed the policy limits of $20,000 (4-5, 132, 135). Attached to such Proof of Loss were three exhibits: Ex. "A" consisted of five pages of items, totaling $12,949.50; Ex. "B" was entitled "Completely Destroyed Inventory Entirely Consumed By Fire", totaling $20,600.00; and Ex. "C" was entitled "Inventory Undamaged By Fire" consisting of assorted lumber outside the building, totaling $30,000.00.

Third party defendant H. D. Jensen furnished the information for and checked the Proof of Loss before it was executed by Appellee (78, 135, 333-334, 525-526). After the fire, Eugene L. Fox helped H. D. Jensen take a physical inventory of the stock items listed at pages 1 to 5 in said Ex. "A", but Fox did not determine the value of such items (Ex. 19, 266, 270).

Appellee's 1955 U. S. Tax Return reflected the inventory as of December 31, 1955, was $15,478.11 (Ex. "I", Iden., 570-1); and said financial statement of June 14, 1956, reflected an inventory as of June 1, 1956, at $28,080.00 (Ex. "AY", 571).

Employees of the Company were familiar with the area in the west half of the building. *John Roberts,* former yardman, stated that 10 days to 2 weeks before the fire there was approximately 2,000 board feet of lumber in the whole building, including about 1,000 board feet marked in the areas delineated X^{3-4-5} by Appellee; there was no redwood molding stored along the west wall, but there was some drop siding; during the year that Roberts worked at the premises (353-4) no molding was remanufactured (359); after the fire, Appellee asked Roberts how much lumber burned up in the building (355-357, 360). *John E. Wilson,* a driver and general workman of the Company, drove a lumber stacker in the west half of the building two days before the fire and picked up some boxes and irons for Ragsdale (370); and the only lumber in the building was scattered around on the floor; from March, 1956, to the fire he did not see any lumber being stacked or stacked in the west half of the building (368, 370-371).

Ellen Van Harpen, bookkeeper for the past year before the fire, testified the only lumber in said west half of the building was in a criss-cross pile three or four high, covering a 12 x 14′ space in the area delineated by Appellee as X^{5-3-4} on Diagram Ex. "A"; and, during the year she worked, no shipment had been stored in the west half of the building (485, 492-494, 504-505).

Therefore, IT WAS NOT kiln-dried molding, piled in units either strapped tight or strippers put between the layers or stakes, 6 to 13 feet or 4 to 9 feet high,

4 feet wide and 22 feet long as testified by Appellee (141-145, 84).

The total inventory, inside and outside the building was approximately $28,080.00 on June 1, 1956, as reflected in a financial statement, dated June 14, 1956, to the Bank (571); no substantial delivery was received or put on the building during June, 1956 (505), and Appellee didn't know whether any merchandise was bought after said financial statement was given (200); and the total inventory at the time of the fire was not $63,549.50 as claimed in the Proof of Loss (Ex. "K").

Appellee had no recollection of any molding or fence board being brought into the west half of the building during the month of June up to the fire (170, 171). Neither 200 squares of asphaltic roofing materials valued at $1,680.00 in said Ex. "B" nor wiring used to bind such materials were found after the fire except four squares in the SW room and two or three squares in the front window (464-465). Such squares or metal bindings do not burn out of sight (464).

Stock items listed in said Ex. "A" of the Proof of Loss totaled $12,949.50, of which $7,500.00 was allocated to said portable sawmill based upon an alleged trade-in credit of $7,500.00 from Dayton Murray Truck Sales on January 1, 1956.[14] On January 12,

[14]Over hearsay and best evidence rule objections of Appellant, Witness Dayton Murray Jr. testified to such credit (336-345) See: Specification of Error "VI".

1956, Appellee executed a written contract with Dayton Murray Truck Sales, a corporation, and Yellow Manufacturing Acceptance Corp. (a finance corporation for General Motors Company), (340) wherein Eureka Lumber Company purchased a truck and trailer from Dayton Murray Truck Sales, accepted such portable saw mill at a "trade-in" of $4,000.00 and allowed Eureka Lumber Company a credit of $4,000.00 (Ex. AO, 518, 521). At the time of such transaction, W. A. Threlkeld was and had been the owner of said Dayton Murray Truck Sales since September 1953 (346-347), but Threlkeld was not called as a witness. Such portable saw mill was repairable for about $1,700.00 (510); and there was salvage in the motor block (192-194).

It was stipulated that two electric motors, valued at $600.00 and $700.00 at page 5 of said Ex. "A" of said Proof of Loss were from Hill & Morten Company, Inc.; the day after the fire Bert Gilbert of Hill & Morten Company Inc. was at the Eureka Lumber Co. (186); and, on August 31, 1956, Hill & Morten Company originated a claim for each of such motors with its insurer, American National Fire Insurance under policy 151093, which insured Hill & Morten Company for such loss; thereafter, Hill & Morten Company filed a Proof of Loss with American National Fire Insurance for the loss of such motors in the amount of $1,130.00, which was paid by American National Fire Insurance by a draft payable to Hill & Morten Company and Bank of America in the amount of $1,130.00 (575).

The set of planer heads and knives ($590.00) listed at page 5 of said Proof of Loss inventory (Ex. "K") were on a shelf in the first floor office room on the west wall near a paint mixer, and the area was undamaged by fire (Photo Ex. "G"). Appellee did not inspect them after the fire (183-4); and he could not identify the seller (185).

Other items listed in said Exhibit "A" of the Proof of Loss showed that Appellee as wholesaler was listing a retail price and not the wholesale price; light foundation bolts were 7 to 8 cents a piece not $.15 (467); Pabco roof coating was 74 or 75 cents a gallon—not $1.10 (467); a vent and wall window was $20 to $25 not $54.00 (467); a four foot metal kitchen cabinet was $80 to $90 not $145.00 (468); a double sink was $30.00 not $51.00 (468); the plumbing items such as ell's and T's ($70.77) were useable after the fire (182-3), but they were permitted to rust (469).

Policy lines 7-24 (Ex. 1) provide, in part:

> "This company shall not be liable for loss by fire or other perils insured against in this policy caused * * * by: (i) neglect of the insured to use all reasonable means to save and preserve the property at and after a loss, * * *; (j) nor shall this company be liable for loss by theft." (26.)

(2) Appellee Had Knowledge of Time and Origin of Incendiary Fire.

In his Proof of Loss Appellee stated the fire originated about 12 noon, and he did not know the cause of the fire (Ex. K). He told Fireman McBeth, he

left the premises at 11:40 A.M. for lunch, and H. D. Jensen said he left between 5 to twelve and 5 after twelve (429). To the contrary, under cross-examination, H. D. Jensen admitted he was at the building until about 12:15 (529); Appellee admitted he was at the building until about 12:05 P.M. and returned at 12:30 P.M. (244), but he denied he knew what time the fire started (245). H. D. Jensen was observed fleeing from the direction of the building after the fire was discovered and before the alarm sounded (Musser 260-263).

Therefore, there was substantial evidence that the Proof of Loss was false as to the quantity of the stock and amount of loss, and that Appellee knew the time of the fire and its origin; and the evidence offered by Appellant as to the financial condition of Appellee and H. D. Jensen was admissible either to show motive or to connect Appellee and H. D. Jensen with said fraud, concealment, or the incendiary fire.

VII. APPELLANT'S REQUESTED INSTRUCTIONS NOS. 8, 29, 18, 19-21, RE: FRAUD AND CONCEALMENT AS TO APPELLEE'S KNOWLEDGE OF THE ORIGIN OF THE FIRE AS A DEFENSE, AND ITS BURDEN OF PROOF, BY A PREPONDERANCE OF THE EVIDENCE, ERRONEOUSLY REFUSED.

Appellant's proposed instruction No. 8 (26), which the Court failed to give was in the exact language of Sect. 2071 of the Insurance Code and the policy (26-27).

Policy lines 1-5, expressly, provided:

"Concealment, Fraud.

This entire policy shall be void if, whether before or after a loss, the insured has wilfully concealed or misrepresented any material fact or circumstance concerning this insurance or the subject thereof, or the interest of the insured therein, or in case of any fraud or false swearing by the insured relating thereto."

An insured may commit fraud by concealing or misrepresenting his knowledge concerning the origin of a fire,

Singleton v. Hartford Fire Ins. Co. (1930), 105 Cal.App. 320, 326, 287 P. 529.

In its Answer (17, 5th Defense 2(a)), Appellant raised the defense that Appellee fraudulently stated he did not know the cause or origin of the fire; whereas, in fact, he did know them. There is ample evidence that he was well aware of the incendiary origin of this fire. At the trial he admitted he told Fireman McBeth, somebody set the fire (114); it was an incendiary fire with an inflammable liquid used at the point of origin (431-432), where an unexplained 5 gallon open top diesel container was found (440), and 2 unexplained one gal. open top diesel containers and partially burned rag were found in the lumber pile (437-439); he took H. D. Jensen's son and companion away from the premises, leaving H. D. Jensen free to set the fire (113, 244, 429); from which H. D. Jensen was observed fleeing before the fire alarm sounded (258-264); and he knowingly failed to have H. D.

Jensen submit to an examination under oath (213-215).

Proposed Instruction No. 24 read:

"Burden of Proving Concealment, Fraud or Arson.

While the burden of proving concealment, misrepresentation or fraud on the part of the plaintiff to void such policy is upon the defendant, the law does not require demonstration, that is, such degree of proof as, excluding possibility of error, produces absolute certainty, because such proof is rarely possible, as concealment, misrepresentation or fraud are usually planned and executed with stealth and secrecy. In a civil action it is proper to find that defendant has succeeded in carrying its burden of proof on the issue of concealment, misrepresentation or fraud if the evidence favoring their side of the question is more convincing than that tending to support the contrary side, and if it causes you to believe that on that issue the probability of truth favors the defendant.

Concealment, misrepresentation or fraud as to the origin of a fire is provable by circumstantial evidence, that is, by inference reasonably deducible from facts proven, and this is so because the law recognizes the intrinsic difficulty of establishing such a concealment, misrepresentation or fraud by direct evidence, as a person who sets a fire to a building usually plans and executes his plan with stealth and secrecy. Consequently all of the circumstances preceding and surrounding the origin of the fire of June 25, 1956, as well as the aftermath to the fire, may be considered by

> you in determining whether plaintiff has wilfully concealed, misrepresented or committed any fraud concerning this fire." (32.)

Appellant's proposed instruction No. 18 defined the term "concealment" in the language of section 330 of the Insurance Code of California (30); proposed Instruction No. 21 defined the term "materiality" in the language of section 334 of said Insurance Code (3d), and proposed Instruction No. 19 stated that whether the concealment is intentional or unintentional it voids the policy.

Gates v. General Casualty Co. of America (1941 9th Cir.), 120 Fed. 2d 925, 927;
Hogel & Co. v. U.S. Fidelity & Guarantee Co. (1939), 35 C.A.2d 171, 181, 94 P.2d 1046.

Appellant excepted to the failure of the Court to instruct the jury on such issues (594-597). In *People v. Kessler* (1944), 62 C.A.2d 817 at 823, 145 P.2d 656, the Court pointed out:

> "Crimes which are committed by setting fire to property are usually planned and executed with stealth and secrecy."

In the absence of said Instructions Nos. 8, 24, 18, 19 and 21, Appellant's right to assert the defense of fraud or concealment arising out of Appellee's false denial of knowledge of the origin of the incendiary fire, or the concealment of the requested books, invoices and records of the Company and Appellee, was not known to the jury. Therefore, it was error to fail to submit such issues to the jury.

A. Jury Specifically Requested Court for Instruction Whether Fraud of Employee Imputable to Employer.

During its deliberations, the jury asked the Court whether fraud by an employee binds his employer, but the Court refused to instruct the jury on the subject (598-600).

B. Fraud or Misrepresentation by Insured's Agent After Loss Voids the Policy.

This Court and California have recognized the well settled general rule that a principal is liable for the frauds and misrepresentations of his agent acting within the scope of his employment, and has held that the fraud of such agent voids the policy.

In *Stockton Combined Harvester and Agricultural Workers v. Glens Falls Insurance Co.* (1893), 98 Cal. 557 at 574-576, 33 P. 633, the Court held the insured was bound by the fraudulent representation and concealment of the books and inventories of the chief bookkeeper. In *Hyland v. Miller National Insurance Company* (1932 Cir. 9), 91 F.2d 735 at 743, where the insured claimed he did not know how many goods he had in his factory, he left his bookkeeping and insurance matters to his bookkeeper, and he took the words of his bookkeeper and accountants as to the amount of his goods and damage thereto, this Court held the insured was bound by the gross exaggeration of the agents and the policy was void for violation of the same fraud provisions of the policy that were quoted in Appellant's said proposed Instruction No. 8.

VIII. IT WAS ERROR TO LIMIT APPELLANT'S CROSS-EXAMINATION OF APPELLEE AS TO WHETHER APPELLEE KNOWINGLY CAUSED H. D. JENSEN NOT TO SUBMIT TO THE REQUESTED EXAMINATION UNDER OATH ON OCTOBER 12, 1956.

A. Named Insured Was Eureka Lumber Company.

The named insured under the contract of insurance was "EUREKA LUMBER COMPANY" (4, 11)—no mention was made of either Appellee or H. D. Jensen, and Appellant did not know whether either had an insurable interest in the stock.

B. Policy Provides for Examination Under Oath to Protect Against Fraud.

Section 2071 Insurance Code and the policy at lines 113-122 provided:

> "The insured, as often as may be reasonably required, shall exhibit to any person designated by this company all that remains of any property herein described, and submit to examinations under oath by any person named by this company, and subscribe the same; and, as often as may be reasonably required, shall produce for examination all books of account, bills, invoices and other vouchers, or certified copies thereof if originals be lost, at such reasonable time and place as may be designated by this company or its representatives, and shall permit extracts and copies thereof to be made."

The purpose of such provisions is to protect an insurer by enabling the insurer to obtain all knowledge and information as to other sources and means

of knowledge in regard to the facts material to its rights; and to enable it to decide upon its obligations and to protect itself against false and fraudulent claims,

Claflin v. Commercial Ins. Co., 110 U.S. 81, 95-6, 28 L.Ed. 76, 82, 3 S.Ct. 507.

Further, like provisions have been held to include the right to examine employees of the insured,

Hart v. Mechanics & Traders Ins. Co. (1942), 46 Fed.Sup. 166, 169.

See:

Rosenfeld v. Union Ins. Society (1957 D.C. N.Y.), 157 Fed.Supp. 395—where it was the duty of insured to inform insurer of her husband's criminal record.

C. California Requires Full Compliance With the Examination Under Oath Provision.

The fact that the insured may incriminate himself is no defense to a request to an Examination Under Oath,

Hickman v. London Assur. Corp. (1920), 184 Cal. 524, 195 Pac. 45.

Even where illness prevented the attendance of the insured at a scheduled Examination under Oath, the insured was required to submit to an examination at another time,

Bergeron v. Employees Fire Ins. Co. (1931), 115 Cal.App. 672, 2 P.2d 453.

Where the insured refused to answer questions concerning when or how she acquired "out of sight" loss items, she could not recover,

Robinson v. National Automobile Ins. Co. (1955), 132 C.A.2d 709, 712, 282 P.2d 930.

D. There Was Good Cause to Request H. D. Jensen to Submit to an Examination Under Oath.

Assuming H. D. Jensen did not have an insurable interest in the loss, but was sales manager for Appellee, Appellant was entitled to have him examined under oath for these reasons: H. D. Jensen was in charge of the business records of the business before the fire and a complete set of books was kept (221, 486), having set them up and keeping the "financial deal" for Appellee (137, 202); he bought a lot of lumber (230); was held out as a sales manager (230); he ran his personal transactions through the account of the Company (234); he made out the financial statements given to the Crocker-Anglo Bank (Ex. 17 and 18, 195-200); after the fire H. D. Jensen operated the business under the name of Eureka Lumber Company (235); he gathered the information for the Proof of Loss and checked over the Proof of Loss for Appellee's signature (135, 333-334, 525, 270). H. D. Jensen was the last person left in the building after Ellen Van Harpen left at 12:05 P.M. (495); shortly after the fire was discovered and before the fire alarm sounded at 12:21 P.M. he was seen fleeing from the direction of the building (262-264); the fire originated in the SW room (431-437; 445-448), where he had been alone the morning of the fire (495), and he had

access to the room after Van Harpen left at 12:05 P.M.; the Proof of Loss executed by Appellee and prepared and checked by H. D. Jensen on behalf of Eureka Lumber Company on August 22, 1956, stated Appellee had no knowledge of the origin of the fire (Ex. K).

With such background, on September 26, 1956, Appellant requested the Company to exhibit to Russell M. Stearns, C.P.A., at the City of Eureka, its books of account, bills, invoices and other vouchers for examination (Ex. AU); and October 3 to 5, 1956, Stearns examined such records (545, 547). Stearns was not shown:

(i) General ledger for calendar years 1954, 1955 and 1956;

(ii) Accounts receivable ledger;

(iii) Sales journal;

(iv) All vendor's invoices and statements for 1956;

(v) All sales invoices for 1956;

(vi) Part of payroll records for June, 1956 (547-548, 550).

At his examination, Appellee testified he didn't know how much merchandise Eureka Lumber Company had at the time of the fire (224) and he didn't know what records were destroyed by or found after the fire by H. D. Jensen (238, 223).

Under such circumstances, Appellant was entitled to inquire of H. D. Jensen as to his knowledge con-

cerning the books and invoices after the fire; the quantity, value of and loss to the inventory, particularly, the burned "out of sight" part; his insurable interest in the stock; his knowledge concerning the time and origin of the fire, including the open 5 gal. container at the point of origin, the 2 one gallon containers in the lumber pile, and his flight from the scene. Each of such questions was material to an inquiry by Appellant to determine whether this was an honest fire with a bona fide loss, entitling it to pay the loss to the limits of its coverage.

E. The Examination Under Oath Was Properly Scheduled.

By written notice, the Examination Under Oath was scheduled to be made in the office of Appellee's attorney in the presence of Appellee in the City of Eureka (Ex. H). No objection was ever made to the time or place for the examination.

F. Appellee's Counsel and H. D. Jensen Received Actual Notice.

The examination notice dated October 8, 1956, was addressed to Eureka Lumber Company, Appellee and H. D. Jensen in care of Appellee's attorney Frederick Hilger (208, Ex. H). Prior to the scheduled examination, Mr. Hilger discussed its contents with Appellee (208); and gave H. D. Jensen actual notice of said request for said Examination Under Oath (217).

(1) Notice to Appellee's Counsel and His Sales Manager H. D. Jensen Was Imputable to Appellee.

Notice or knowledge possessed by an agent is imputable to the principal, and this rule applies to an attorney and his client,

Chapman College v. Wagener (1955), 45 C.2d 796, 802, 291 P.2d 445;

Mabb v. Stewart (1905), 147 Cal. 413, 421, 81 P. 1073.

Prior to the notice of October 8, 1956, Mr. Hilger was Appellee's Attorney and arranged for said Russell M. Stearns to examine records of the Company and Appellee after Appellant's request of September 26, 1956, that the records be exhibited to Mr. Stearns (Ex. AU, 545-547). Appellee has claimed at all times that H. D. Jensen was his agent and sales manager to and including the scheduled Examination Under Oath (230, and offer of Proof 214).

Therefore, Appellee knew prior to the scheduled examination of H. D. Jensen that the latter was requested by Appellant to appear for such examination.

G. H. D. Jensen Failed to Appear for Examination.

Appellee admitted that H. D. Jensen did not appear for the scheduled Examination Under Oath (210, 217). Although Appellee had actual knowledge of H. D. Jensen's non-appearance, he did not have him appear or offer to have him appear for an examination under oath at any time before this suit was filed on December 5, 1956 (210).

H. Defense Raised in Answer and Shown by Evidence.

In its Answer, Appellant alleged that pursuant to said conspiracy, H. D. Jensen refused to appear for an examination under oath (19, Sixth Defense Par. 2 (d)). Accordingly, at the trial as evidence of such conspiracy, Appellant proved there was good cause to examine H. D. Jensen, the giving and receipt of the written notice for the examination, and the failure to appear. Also, Appellant proved the circumstances that Appellee and H. D. Jensen were living under the same roof; Appellee had H. D. Jensen take the records and inventory after the fire and gather the information for and check the Proof of Loss; and Appellee's counsel had the original notice for Appellee and H. D. Jensen to appear for an Examination Under Oath and produce the records at the office of Appellee's counsel.

By cross-examination of Appellee, Appellant sought to prove that knowing of the scheduled examination Appellee sent H. D. Jensen out of the City of Eureka the morning of the scheduled examination, but the trial Court sustained an objection to questions addressed to such facts (211). Whereupon Appellant offered to prove such facts by reading the record of the Examination Under Oath of Appellee, wherein Appellee admitted that he told H. D. Jensen that he was going to appear for the examination; and, he sent H. D. Jensen out of Eureka to buy lumber anywhere he could buy some (213-215). Certainly, such evidence would support a finding that Appellee's testimony that he did not know H. D. Jensen had been requested

to appear at the Examination Under Oath was "inherently improbable"; further, that pursuant to the conspiracy H. D. Jensen did not submit to an examination.

IX. ERROR TO REFUSE TO STRIKE OR PERMIT CROSS-EXAMINATION OF APPELLEE ON HIS VOLUNTARY STATEMENT "THAT IS A LIE".

In response to a question addressed to counsel by the Court as to what difference it made as to whether Appellee saw H. D. Jensen the morning scheduled for said examination of H. D. Jensen, Appellant's counsel replied:

> "Mr. Castro. There are cases that hold, your Honor, that you are entitled to examine the employee under oath on these losses.
>
> The Court. What has that got to do with the examination of this witness? If you want to make a point of it all you have to do is to show you requested the examination but he did not appear. I do not see how that is material in the examination of this witness.
>
> I want to show this witness (Appellee) sent him out of town that morning" (parenthesis added)

whereupon, Appellee stated:

> "That is a lie." (211.)

Appellant immediately moved to strike the statement by Appellee as not responsive to any question. The Court denied the motion. Appellant asked the Court to allow counsel the right to cross-examine Appellee as to the voluntary statement. The Court denied the

right of cross-examination. Thereupon, Appellant moved to strike the statement upon the further ground Appellant had been deprived of the right of cross-examination. The Court denied that motion (212); and the Court sustained the following objections to questions which followed as to whether Appellee sent H. D. Jensen out of Eureka (212-213):

> "Q. (By Mr. Castro). On the morning of the examination under oath did you furnish Dee Jensen your car to leave the City of Eureka?
>
> Mr. Hilger. I will object to that as totally immaterial.
>
> The Witness. I can answer. No.
>
> The Court. I will sustain the objection.
>
> Q. (By Mr. Castro). On the morning of the examination under oath, did you know that Dee Jensen was requested to appear for that examination under Oath?
>
> Mr. Hilger. I object to that as immaterial.
>
> The Court. Sustained.
>
> Q. (By Mr. Castro). On the morning of the examination under oath you sent Dee Jensen out of the City of Eureka, didn't you?
>
> Mr. Hilger. I will object to that and cite it as misconduct of counsel, in addition to being immaterial.
>
> The Court. I will sustain the objection, and if counsel persists in this examination I will take further measures. You have already asked that question and he answered it in quite emphatic terms, and I do not think there is need to repeat it."

Whereupon, Appellant made its offer of proof, that Appellee, in fact sent H. D. Jensen out of Eureka,

which offer was rejected (213-221). The circumstances surrounding H. D. Jensen's failure to appear for the scheduled examination were admissible as bearing on the defense of fraud and concealment, conspiracy, the incendiary origin of the fire and whether Appellee breached the policy. The Jury could well have found from the offered evidence that Appellee knowingly told H. D. Jensen not to appear for the examination, and that such conduct was pursuant to a conspiracy to defraud Appellant. Therefore, it was error to refuse to permit Appellant to examine Appellee as to whether he saw H. D. Jensen on the morning of the scheduled examination; what was said between them; what Appellee had him do.

The error was compounded by the Court's refusal to strike Appellee's voluntary statement or permit him to be examined on such statement.

The consequence of the Court's ruling was that Appellee's statement "That's a lie" with reference to sending H. D. Jensen out of town was permitted to stand and Appellant was denied the opportunity to cross-examine Appellee on the point.

X. APPELLANT REQUESTED INSTRUCTION TO JURY ON RIGHT TO EXAMINATION UNDER OATH—NO INSTRUCTION GIVEN.

As stated in *Hart v. Mechanics & Traders Insurance Co.* (1942 Dist. Ct. W.D. La.), 46 Fed.Sup. 166 at 169, an insurance company is entitled to examine the agents of the insured to determine its obligation and to protect itself against false claims:

> "The purpose of such a provision in an insurance policy is to protect the insurer against fraud, by permitting it to probe into the circumstances of the loss, including an examination of the insured, or his agents. By such course, it is better able to determine its obligations and to protect itself against false claims. Claflin v. Commonwealth Fire Insurance Company, 110 U.S. 81, 3 S.Ct. 507, 28 L.Ed. 75." (p. 169.)

In its proposed instruction No. 3 (24) Appellant requested the Court to call to the Jury's attention the examination under oath provision of the policy, and that a failure to comply therewith constitutes a defense.

In its proposed instruction No. 5 (26) Appellant requested the Court to instruct the Jury that the word "shall" used in the policy is mandatory.

In its proposed instruction No. 4 (25-26) Appellant requested the Court to inform the Jury that the burden of proof was upon Appellee to prove that he performed the conditions of the policy. After the Court omitted to instruct on such subjects, the Appellant excepted to the omission (596).

The failure to comply with said examination under oath provisions has been held to constitute a complete defense to a claim by the insured. Also, it was one of the overt acts of the conspiracy with Appellee (19, 6th Defense (d).) There was substantial evidence that H. D. Jensen was an agent for Appellee, being the Sales Manager of the Company's business (230), in charge of its books and finance, purchasing its lumber in his name and putting the Company money

through his bank account (230, 233), running his personal business through the Company (234), arranging for this insurance (61), taking charge of the record and inventory after the fire (237-238), preparing and checking the proof of loss (135, 270, 525-6).

Therefore, Appellant was entitled to have the Jury know that a failure of H. D. Jensen to submit to said examination under oath would constitute a defense to Appellee's claim.

XI. REFUSAL TO ADMIT IN EVIDENCE WRITTEN AGREEMENT EXECUTED BETWEEN APPELLEE, H. D. JENSEN AND OTHERS FOR EUREKA LUMBER COMPANY, AN ERROR.

In its answer, Appellant alleged in its Seventh Defense that H. D. Jensen was a real party in interest (19); and in its Fifth Defense, Par. 2 (f) (18) that said H. D. Jensen had an interest in the loss which Appellee concealed (18).

During the trial Appellant stated to the Court that the issue of H. D. Jensen's said interest was before the Court (68-9). Under the express terms of the insuring agreement of the policy the liability of Appellant did not exceed:

> "nor in any event for more than the interest of the insured . . ."

By statute the policy is required to specify:

1. The interest of the insured in property insured if he is not the absolute owner thereof, Ins. C. 381 (c). The named insured under the policy was Eureka Lumber Company. By statute, if the insured has no insurable interest at the time the policy takes effect

and when the loss occurs, the contract is void, Ins. C. Sects. 280, 286. If Eureka Lumber Company had no insurable interest in the stock the policy would be void.

In the proof of loss that he executed on behalf of the Company, Appellee stated that the Company was the sole owner of the stock and no one else had any interest in it (Ex K-Par. 3). Therefore, the interest of H. D. Jensen in the stock was material in that:

(1) Such interest could void the policy;

(2) It would be a ground, independent of any employment or relationship agreement, entitling Appellant to examine H. D. Jensen under oath; and

(3) It would be evidence of fraud, concealment and conspiracy, particularly in view of Appellee's claim of no interest in H. D. Jensen.

As a part of the evidence on the issue of the interest of H. D. Jensen, in cross-examination of Appellee, Appellant developed the fact that a transaction had occurred wherein the Eureka Lumber Company was purportedly transferred to which transaction H. D. Jensen was a party (227-229). As a part of the proof of such transaction, Appellant offered in evidence a written agreement purportedly covering this transaction, which document the Court rejected (Ex. J. Identif. 229).[15] This ruling was error.

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[15]The Alert Lumber Co. mentioned in Ex. J was identified by H. D. Jensen as: "A. Alert Lumber Company. They were going under the Eureka Lumber Company; that's a subsidiary of the Alert." (284)

The document formed a link in the evidence indicating an interest of H. D. Jensen. This chain of evidence starts with the fact that H. D. Jensen and Appellee were active in the operation of a saw mill on the Hanson Road (78, 225-226). In this operation, H. D. Jensen got into serious financial difficulties. Appellee and H. D. Jensen handled the problem by having H. D. Jensen's interest in said saw mill operation transferred as a part of said transaction, whereby the Eureka Lumber Company (the named insured in this policy) was nominally placed in the name of Appellee (Ex. J, Identif. 229). Appellee owed H. D. Jensen money (232). H. D. Jensen ran his personal business through the Company (234). H. D. Jensen voluntarily petitioned the Court to be adjudicated bankrupt. Following such adjudication in bankruptcy and before this fire H. D. Jensen opened a bank account in his name (232-233, Witness A. J. Franceschi) and funds of the Eureka Lumber Company were then deposited in his account, and the account was used in connection with the business (558-560). H. D. Jensen arranged for the fire insurance (61). The evidence concludes with the fact that immediately following the fire, H. D. Jensen operated under the name of the Company (235), had possession of the books of account and records of the Company (237-8), and said truck and trailer purchased by the Company from Dayton Murray Truck Sales was transferred without any consideration to H. D. Jensen (Ex. AP Identif., 523, Witness Richard Hanna). In view of the part that said Ex. J played in this picture, to exclude it was clearly erroneous.

XII. THE COURT ERRED WHEN IT INSTRUCTED THE JURY THAT THE BURDEN OF PROOF WAS UPON APPELLANT TO PROVE APPELLEE "WILFULLY REFUSED" TO PRODUCE REQUESTED RECORDS.

The Court instructed the jury:

"The defendant claims that the plaintiff has not complied with the policy of insurance by not producing all of the records which the defendant demanded, and thereby has debarred himself from recovery in this action. Whether or not the plaintiff has so complied with the policy is a question of fact for you to determine from all the facts and circumstances disclosed by the evidence. If you find that plaintiff substantially and *wilfully failed to produce material records* within his power to produce, then you may find for the defendant; otherwise not. Stated somewhat differently and on the other side, as it were, you should not find in favor of the defendant on this issue unless you are convinced by a preponderance of evidence that the plaintiff *willfully failed to produce records* which were material to his claim of loss and within his power to produce. The defendant has the burden of proving such failure on the part of the plaintiff. I mean by that the defendant has the burden of proving that the plaintiff has substantially and *willfully failed to produce records* within his power to produce." (Emphasis supplied.) (589-590.)

A. Burden of Proof Was Upon Appellee to Prove He Complied With Request to Produce Books and Invoices—Not Appellant to Prove Non-Compliance.

The express provision of policy lines 113 to 122, California fire insurance policy (Ex. 1) and Section 2071 Insurance Code provide: The Insured, "as often

as may be reasonably required, shall produce for examination all books of account, bills, invoices and other vouchers, or certified copies thereof if originals be lost, at such reasonable time and place as may be designated by this company or its representatives, and shall permit extracts and copies thereof to be made."

California has held that after a loss has occurred it is the duty of the insured to comply with this reasonable provision of his contract, and the performance of such duty is a condition precedent to any right of action.

In *Hickman v. London Assurance Corp.* (1920), 184 Cal. 524 at 532, 195 Pac. 45, the Court reversed a judgment for the insured and ordered the trial Court to enter judgment for the insurer, stating:

> "The demand was made upon him by virtue of the stipulation in the contract and by the stipulation alone must his refusal be judged. The stipulation constituted a promissory warranty under which appellants had the right to demand compliance by respondent 'as often as required', and the performance of such stipulation was a condition precedent to any right of action. No question was raised as to the sufficiency of the demand, or, aside from the claim of privilege, as to the reasonableness of the time and place designated in the demand. The obligation to perform the warranty was as binding on respondent as his obligation to pay the premiums on the policies. The respondent did not fulfill his obligation, and stands here as having recovered a judgment upon an express contract one of the

> conditions of which he has failed to perform. In other words, when he commenced this suit he was without a cause of action.
>
> It has been said that 'Mere hardship or difficulty will not excuse a party from carrying out a contract; and, where one contracts to do any act which is possible, he is liable for a breach, even though circumstances arise, without his fault, making it difficult, or even impossible, for him to perform.
>
> It follows that the conclusion of law that respondent's refusal to submit to examination and produce his books and papers on the ground of his constitutional immunity was 'justified . . . proper and right' is erroneous, and that upon the findings of fact as to his refusal judgment should have gone for the appellants."

Pursuant to the insurance contract, policy lines 113 to 122, Appellant made three requests:

(1) By letter dated September 26, 1956, to its named insured Eureka Lumber Company (Ex. AU, 545-547), Appellant set forth said policy and statutory provisions and asked Eureka Lumber Company to "produce all books of account, bills, invoices, and other vouchers, or certified copies thereof if originals be lost relating to the items listed in Exhibits A, B and C attached to the Proof of Loss filed to Policy No. 560594 relating to building materials and other personal property", and designated C.P.A. Russell Stearns to examine them in Eureka (547). On October 3, 4 and 5, 1956, at Eureka, Stearns examined records of the Company at its office, but they did not include:

(i) general ledger for calendar years 1954, 1955 and 1956;

(ii) accounts receivable ledger;

(iii) sales journal;

(iv) all vendor's invoices and statements for 1956;

(v) all sales invoices for 1956;

(vi) part of payroll records for June, 1956 (547-548, 550).

At that time and place, H. D. Jensen stated he had some records at home, and he was asked to bring them to the office of Appellee's Counsel. Such records were not shown to Stearns (545-548) before his departure from Eureka on October 5.

(2) By letter dated October 8, 1956 (Ex. "H"), Appellant requested Appellee and H. D. Jensen to submit to an Examination Under Oath by Augustus Castro at the City of Eureka (205) and to exhibit its books of account, bills, invoices and other vouchers for examination. At that time, H. D. Jensen lived at Appellee's home in Eureka (232) and he was personally notified of the time and place for his Examination Under Oath (217), but did not appear or submit to such an examination at that time or before this action was filed[16] (210).

At the Examination Under Oath of Appellee, Appellant called to Appellee and his counsel's attention,

[16]On May 11, 1957, Appellant took H. D. Jensen's deposition in this action (281-282).

that certain records and invoices had not been shown to Stearns; thereupon, it was agreed by Appellee and his counsel that if Appellant would specify the records, Appellee would exhibit them to Stearns (209-210). Thereafter, Stearns made a written report as to the documents not found by or shown to him (547).

(3) On October 19, 1956, by letter addressed to Eureka Lumber Company, Appellee and H. D. Jensen (Ex. AV, 547), Appellant listed the records not shown to Stearns as:

"(a) General ledger for the calendar years 1954, 1955 and 1956;

(b) Accounts receivable ledger;

(c) Combination Cash and Sales Journal;

(d) All vendors invoices and statements for 1956;

(e) All sales invoices for 1956;

(f) All correspondence for 1956;

(g) All payroll records including the entire month of June, 1956;

(h) All cancelled checks of the Eureka Lumber Company for 1956;

(i) All bank statements together with cancelled checks of Harold D. Jensen for 1955 and 1956."

"As soon as the records are available notify us because the insurance companies have requested Russell M. Stearns to examine such records at Eureka, California, as soon as you make them available.

Therefore, let me know when such unproduced records will be made available."

The Company kept a complete set of books of account (221) consisting of general ledger, general journal, sales journal, accounts receivable ledger, and receipts and cash disbursements journal (486). Such books of account were kept on an open shelf under the counter in the 1st floor office, and the books were posted through May, 1956. Likewise, all invoices, reflecting sales and purchases, were kept in a folder until paid, then they were placed in a steel file next to Ellen Van Harpen's desk in the office. On the morning of the fire, the books and invoices were in her office, except the accounts receivable book which was upstairs. There was no fire or burning of the counter, shelf, desk or file in the fire. After the fire was extinguished, H. D. Jensen took the accounts receivable book from the building, showed it to Mrs. Van Harpen and took it to his pickup. While the ledger of the accounts receivable book was damaged the pages were intact and legible. Several days after the fire Mrs. Van Harpen saw the other books of account undisturbed on the shelf where she had left them the day of the fire, and the invoices had not been disturbed (Photo Ex. "G", 485-492). After the fire, H. D. Jensen admitted he had some records at home, which he was requested to exhibit to Mr. Stearns but did not do (546); further, he removed the accounts receivable book after the fire, made a reconstruction of it and gave it to Mr. Hilger (572-5).

A standard method used by Certified Public Accountants to establish an inventory at a given time is to take a beginning inventory, add to it the sub-

sequent quantity and dollar value of the purchases, then deduct the quantity and dollar value of the sales, and the balance reflects the quantities and value left at the end of the period (548). Although Appellee's 1955 U. S. Tax Return reflected the inventory as of December 31, 1955, was $15,478.11 (Ex. I, 570-1), and Appellee's said financial statement June 14, 1956, reflected the inventory as of June 1, 1956, was $28,-080.00 (Ex. AY, 571), accountant Stearns was unable to determine from either the tax return or the financial statement how much of the inventory in December or June was hardware, redwood molding or other merchandise in the building or the outside yard (570-2).

Suit was filed on December 5, 1956, without the listed records being exhibited. On January 22 and 23, 1957, Stearns went to Eureka to examine the records he had not been shown. However, he was not shown the requested records listed as "a" to "i" in the October 19, 1956, request, but was shown the same records he saw on his earlier trip in September, 1956, except for a single sheet of paper with names, some addresses and some amounts with some notations of "Paid" (Ex. AW, 549-550).

There was no evidence to show any of said records listed as "a" to "i" were exhibited to Appellant as required by the express provisions of the policy.

B. The Court Erred in Refusing to Instruct the Jury That the Burden of Proof Was Upon Appellee to Show That He Had Fulfilled the Requirements of the Policy.

Appellant's proposed instruction No. 3 read (24-25):

"Compliance with Conditions Precedent Required.

The standard California fire insurance policy provides that:

'No suit or action on this policy for the recovery of any claim shall be sustainable in any court of law or equity unless all the requirements of this policy will have been complied with, . . .'

In its answer, defendant has set forth that plaintiff did not comply with the following requirements of the standard California fire insurance policy in that such policy provides as follows:

'The insured, as often as may be reasonably required, shall exhibit to any person designated by this company all that remains of any property herein described, and submit to examinations under oath by any person named by this company, and subscribed the same; and, as often as may be reasonably required, shall produce for examination all books of account, bills, invoices and other vouchers, or certified copies thereof if originals be lost, at such reasonable time and place as may be designated by this company or its representatives, and shall permit extracts and copies thereof to be made.'

When an insured has failed to comply with the requirements of the policy which require him to produce said bills, invoices and other vouchers, or copies thereof if the originals be lost or fail to submit to an examination under oath, the

failure either to produce such documents or submit to such Examination Under Oath constitutes a complete defense to any action on the policy.

Hickman v. London Assurance Co. (1920) 184 Cal. 524; 195 P. 45—failure to submit to examination under oath; Baldwin v. Bankers & Shippers Ins. Co. (1955 Cir. 9th) 222 Fed. 2d 953. Seivel v. Lebaneon Mutual Ins. Co. (1900) 46 Atl. 851—failure to produce books and documents. Robinson v. National Automobile Ins. Co. (1955) 132 C.A. 2d 909, 912; 282 P. 2d 930—failure to answer questions in out of sight loss."

Appellant's proposed Instruction No. 4 read (25-26):

"Burden of Proof

An insurer is not liable except upon proof that the loss has occurred with the terms of the policy and the burden of proof is upon the insured to prove that he has performed the conditions of the policy.

Rizzutto v. National Reserve Ins. Co. (1949) 92 C.A. 2d 143; 206 P. 2d 431, 432."

Certainly, as pointed out in *Hickman v. London Assurance Company* (1920), 184 Cal. 524 at 532, 195 Pac. 45, the obligation was upon Appellee to prove that he had submitted the requested records or copies, if the originals were lost—not upon Appellant to prove the failure to produce was wilful.

Therefore, it was error to instruct the Jury that the burden was upon Appellant to prove that Appellee "wilfully" failed to produce said records, and to

refuse to instruct that the burden was upon Appellee to prove he had produced the records.

XIII. APPELLANT WAS ENTITLED TO CROSS-EXAMINE APPELLEE AS TO HIS KNOWLEDGE OF EUREKA LUMBER COMPANY'S STOCK INVENTORY AS OF THE CLOSE OF ITS BUSINESS YEAR ON DECEMBER 31, 1955.

Because of the claimed "out of sight" loss and the absence of invoices to support such loss, Appellant sought to establish a normal, and recognized, starting point for the inventory; then, determine purchases and sales thereafter. In the financial statement dated June 14, 1956, to Crocker-Anglo Bank (Ex. 18), Appellee stated that as of December 31, 1955, the Company's closing inventory for the calendar year 1955 was $15,478.11. So, Appellant asked Appellee if he knew of any other inventory as of December 31, 1955 (202-203):

"Q. To your knowledge was there any additional inventory at the time referred to?

Mr. Hilger. To what date are we now referring?

Mr. Castro. Referring to Exhibit 18, which was the proof of loss on June 1, 1956, containing a statement fixing an inventory of $15,478.11.

Mr. Hilger. I doubt if any proof of loss was filed on the date given, counsel.

Mr. Castro. I am not talking about proof of loss.

Mr. Hilger. You stated proof of loss. You may not have meant it.

Mr. Castro. Profit and loss statement.

Mr. Hilger. I am going to object to that as being too remote from the date of June 5, 1956, as to what might or might not have been in there. We have gone back to December 31, 1955, which is six and a half months prior to the fire, and what inventory was there on that date has absolutely no connection.

The Court. Is that what you are reading from, a profit and loss statement for 1955?

Mr. Castro. June 1, 1956, to which is attached a profit and loss statement dated December 31, 1955.

The Court. Then it is a profit and loss statement for 1955 that you are referring to.

Mr. Castro. No, I am referring to a profit and loss statement which is Exhibit 18, which was under date of June 1, 1956, and attached to it on the inside is a profit and loss statement reflecting the inventory as of the close of business in 1955.

Mr. Hilger. And the specific question has to do with the inventory of December 31, 1955, which I submit is too remote in time to have anything to do with the existence or non-existence of an inventory on June 25, 1956.

The Court. I think the objection is good."

If there was no other inventory at the close of business on December 31, 1955, it would have given a recognized starting point for determining the inventory at the time of the fire. The record of purchases and sales between December 31, 1955, and June 1, 1956, could have been used to verify that the inventory at the close of business on June 1, 1956,—25 days before the fire—was only $28,080, as reflected in the same financial statement (Ex. 18, AY, 571), consisting of

"Merchandise—Finished $18,280.60" and "Merchandise in Process $9,799.40". Appellee did not know of any merchandise bought between June 1, and 25, 1956 (200). Therefore, the gross exaggeration of an inventory of $63,599.54, and a loss of $33,549.54, including the "out of sight" portion of $20,500.00 (Ex. K), would have been demonstrated by Appellee's own testimony.

XIV. TESTIMONY OF APPELLEE THAT AFTER THE FIRE MR. MOSER TOLD HIM THAT TWO TRUCK DRIVERS HAD SEEN TWO MEN, AND APPELLEE TOLD POLICE AND FIREMAN ABOUT THE TWO MEN WAS HEARSAY AND INADMISSIBLE.

In direct examination, Appellee, over the hearsay objection of Appellant, testified that he told fireman McBeth that he thought somebody set the fire, and Mr. Moser told Appellant that 2 truck drivers had told Moser they had seen 2 men at the fire, which conversation Appellee reported to the policemen and fireman (114-116):

"Q. (By Mr. Hilger). After the fire was put out, did you do anything else in connection with it during the existence of the fire, that is, yourself personally?

A. Yes, we went in and looked things over.

Q. When was this? During the fire?

A. Right after the fire.

Q. You mean after it was put out?

A. Yes. Mr. McBeth, one of the firemen, was there and he asked me how I thought it caught fire, and I told him I didn't know. I said, 'I think somebody set it afire.' I said, 'We had

better get an investigator'. I told him and the fire chief. In the meantime we walked outside. Mr. Moser—he is a truck dispatcher that is on the opposite corner—two fellows, truck drivers, told him that they had seen two men——

Mr. Castro. Just a moment." (114)

"The Court. This will be hearsay, I'm afraid, counsel.

Mr. Hilger. I'm afraid that would be, your Honor. I want to establish this fact.

Q. Did you receive information concerning anyone being seen around the place?

A. Yes, I did.

Mr. Castro. I object to that as hearsay.

Mr. Hilger. I just want to find out if he received the information.

Mr. Castro. I object to that as hearsay. What information he may or may not have received in the absence of the defendant, Your Honor, I believe is hearsay.

The Court. As long as he does not say what it was, he may use that fact as a preliminary to something that he did. I can't tell.

Mr. Hilger. Precisely, your Honor.

The Court. The witness is not to testify to what he heard, but he did receive some information and that much I will allow.

Q. (By Mr. Hilger). You received some information concerning someone seen at the fire, and thereupon what did you do?

A. Yes, I did.

Mr. Castro. Just a moment, Your Honor, I object to that as calling for hearsay.

The Court. I will rule on it after I hear his answer to the next question.

Q. (By Mr. Hilger). What did you do with the information so received?

A. I called Mr. McBeth, the fireman, and the (115) chief of the firemen, and a couple of police officers and told them.

The Court. All right. You gave the information that you received to some police officers.

The Witness. Yes, I did, and the fireman, Mr. McBeth, and I told him——

The Court. You can't say what you told them.

Mr. Hilger. Without saying what you said——

The Witness. I will keep still.

Mr. Hilger. You passed on the information you received.

The Witness. Okay.

The Court. I will allow the answer to stand for the purpose stated. The witness received some information and passed it on to the police officers." (116)

Each of the conversations was outside the presence of Appellant: the statement by the 2 truck drivers to Moser; the statement by Moser to Appellee; and Appellee to McBeth. They were prejudicial since they would lead the jury to belive that 2 unidentified men set the fire—not H. D. Jensen.

See:

Estate of Dolbeer (1906), 149 Cal. 227, 247, 86 P. 695.

XV. TESTIMONY OF DAYTON MURRAY, JR., THAT EUREKA LUMBER COMPANY WAS ALLOWED A "TRADE IN" CREDIT OF $7,500.00 FOR THE SAW MILL ON THE PURCHASE OF A TRUCK AND TRAILER WAS HEARSAY AND INADMISSIBLE.

In said Exhibit "A" of the Proof of Loss (Ex. K), Appellee itemized each item that was "VALUELESS BUT INTACT FOR COUNTING". Such items totaled $13,045.54, of which $7,500.00 was allocated to a portable saw mill listed at page 5 of said exhibit, or 57% of the alleged visual loss.

In his deposition, on direct examination by Appellee, on September 7, 1957, Dayton Murray, Jr., after identifying himself as the present secretary of Dayton Murray Truck Sales, stated he had in his possession a bill of sale and an invoice each dated January 1, 1956 (Ex. 20) pertaining to the said saw mill (335-336). Cross-examination showed that the witness was neither an employee nor officer of Dayton Murray Truck Sales from September, 1953 to February or March, 1956—the witness and his father sold Dayton Murray Truck Sales to W. A. Threlkeld in 1950, and neither was an employee while Threlkeld owned the company (346-358); the invoice was not an original (341), and the witness received the Bill of Sale and carbon invoice in February or March, 1956, from his father (346). There was no showing of the circumstances under which Dayton Murray, Sr. obtained said carbon invoice.

In said direct examination, Dayton Murray, Jr. testified he had no direct knowledge of the trade-in

transaction, but his knowledge was based on discussions with H. D. Jensen and Threlkeld (336). Thereafter, Appellee asked Dayton Murray, Jr.:

> "Now, first what was the transaction, Mr. Murray?"

When Appellant objected on the grounds that the witness had no personal knowledge, only hearsay information (336), Appellee rephrased the question, and Appellant repeated its hearsay objection (337):

> "Mr. Hilger. As a result of the discussions that you have had in the course of the conduct of business of Dayton Murray Truck Sales, state your knowledge of this situation.
>
> Mr. Castro. Object to it as incompetent, irrelevant and immaterial, calling for hearsay. The witness has testified he has no personal knowledge of the transaction.
>
> Mr. Hilger. Please answer the question.
>
> The Witness. From the examination of the records of the Dayton Murray Truck Sales——
>
> Mr. Castro. (Int'g) The question didn't call for an examination of the records of Dayton Murray Truck Sales, it called for your knowledge based upon your discussions had in the course and conduct of business of Dayton Murray Truck Sales.
>
> The Witness. My knowledge based on my discussions of the——
>
> Mr. Castro. (Int'g) Same objection to it, same objection that has been previously made, hearsay and the witness has stated he has no personal knowledge of the transaction.

The Witness. May I answer the question, Counsel?

Mr. Hilger. Yes." (337).

The trial court overruled the objection. Thereupon, the witness testified that from his discussions with H. D. Jensen, Threlkeld and the documents, on January 1, 1956, Threlkeld sold a diesel truck to Eureka Lumber Company and agreed to take the portable saw mill as a trade and allow a credit of $4,000.00 and to allow an additional $3,500.00 credit upon the resale of the saw mill within six months or a certain date (337-338).

The questions are subject to the same objection that they permit the witness to testify upon hearsay information, namely, from his discussions with third persons.

See:

Estate of Dolbeer (1906) 149 Cal. 227, 247, 86 P. 695—where in sustaining an objection to a similar question the Court stated:

"There can be no difference in principle between this question and one which calls for the opinion of the witness based upon what he may have heard. And it has been repeatedly held that to allow a witness to testify upon knowledge or information thus received is error. (People v. Wreden, 59 Cal. 392; Xenia Bank v. Stewart, 114 U.S. 224, (5 Sup. Ct. 845); Flanagan v. State, 106 Ga. 109, (32 S.E. 80); Kehrig v. Peters, 41 Mich. 475, (2 N.W. 801).)"

Clearly, such testimony was hearsay and prejudicial. The discussions between H. D. Jensen and Threlkeld

and the discussions between Murray and H. D. Jensen and Threlkeld were not in the presence of or with the knowledge of Appellant, or its representatives.

See:

Coulter Dry Goods Co. v. Munford (1918) 38 C.A. 231, 234, 175 P. 900—where conversations between plaintiff's general manager and its credit man about the financial condition of defendants were inadmissible as hearsay.

A. Testimony of Dayton Murray, Jr., as to the Meaning of the Figures $4,000.00 and $3,500.00 on a Carbon Invoice Was Hearsay and Not the Best Evidence.

In his deposition on direct examination, Dayton Murray, Jr. was asked by Appellee as to what the figure of $4,000.00'' represented in said carbon invoice. Over Appellant's objection that the original document[17] was the best evidence and Murray had no personal knowledge of the transaction, Murray testified it reflected $4,000.00 credit for the mill (340-341).

In his deposition on direct examination, Appellee asked Dayton Murray, Jr. whether the figure of $3,500.00 in said carbon invoice represented a credit in addition to said $4,000.00. Over Appellant's objection, that it was incompetent, irrelevant and immaterial, the $3,500.00 notation was not shown to be a part of the original invoice or who made the notation, the witness had no personal knowledge of the transaction, and that the question called for the opin-

[17]No showing was made that the original invoice was lost or destroyed, or if this carbon was a true and correct copy.

ion of the witness, Murray testified it was an additional credit of $3,500.00 (342-343).

The best evidence rule applies to proving the contents of any writing.

See:

Lawrence v. Premier Ind. Assur. Co. (1919), 180 Cal. 688, 697, 182 P. 431;

Milwaukee Alaf Co. v. Wetzel (1928), 93 C.A. 775, 790-791, 270 P. 382—where the Court sustained an objection to the question whether the words "iron frames and sash" were not on the plans from which defendant made up his bid on the grounds the plans were the best evidence.

Further, the witness' answer was based on the hearsay discussion that he stated he had with H. D. Jensen and Mr. Threlkeld outside the presence of Appellant (336).

B. Admission of the Carbon Invoice Violated Best Evidence and Hearsay Rule.

At the conclusion of reading the direct examination of the deposition of Dayton Murray, Jr., Appellee offered in evidence said carbon invoice. Over Appellant's objection that it was not the best evidence of the transaction the Court had the carbon invoice, and the Bill of Sale, marked as exhibit 20 (344-345).

A visual examination of such invoice shows that it is carbon and that the notation:

"additional credit of $3,500.00 through June 12, 1956, to be paid to YMAC on this account"

was not part of the original invoice. There was no evidence to show who or when the quoted addition was placed on the carbon of the invoice. Nor was there any evidence to show that the original invoice was lost or destroyed. Also, while it called for the $3500.00 credit to be paid to YMAC, YMAC was never advised of or received such $3500.00 (519). On January 12, 1956, Appellee and Threlkeld, personally, executed a written Conditional Sales Contract with Yellow Motors Acceptance Corporation (Finance Company for General Motors) for said truck, wherein the "trade-in" credit for the sawmill was $4,000.00 only (518-519; Ex. "AO").

Before secondary evidence can be used to establish the contents of a writing, it must be shown that:

(a) an original existed,

Reynolds v. Lincoln (1886), 71 Cal. 183, 194, 9 P. 176, 12 P. 449;

(b) was duly executed,

C.C.P. 1937;

(c) has been lost or destroyed,

Sections 1937 and 1855 C.C.P.;

(d) a true copy,

Dyer v. Hudson (1884), 65 Cal. 372, 373, 4 P. 235.

Such a foundation was not laid by Appellee. Therefore, the carbon invoice was inadmissible and prejudicial because it gave written support to Appellee and the hearsay testimony of Dayton Murray, Jr.

XVI. APPELLANT'S MOTION FOR A DIRECTED VERDICT AND JUDGMENT NON OBSTANTE VEREDICTO SHOULD HAVE BEEN GRANTED.

At the close of all the evidence, Appellant made an oral motion for directed verdict (580-581); and, after the verdict, for a Judgment N.O.V. (37-38) on the grounds that the evidence was uncontradicted that Appellee had not complied with the requirements of the policy to be performed after a loss has occurred.

A. Prior to and After the Fire Eureka Lumber Company Had the Records Which Were Requested But Not Shown to Appellant.

There was a complete set of books of account including a general ledger, general journal, sales journal, accounts receivable ledger, and receipts and cash disbursements journal (221, 486). They were kept under the counter in the first floor office, and were posted through May 1956 (487). All sale and purchase invoices were kept in a folder until paid, when they were put in a steel file on the first floor office. The books and invoices were there the morning of the fire except the accounts receivable ledger, which H. D. Jensen took (487-488). While the books and invoices in the first floor office were not damaged by the fire (490-492), the accounts receivable book was damaged on the edges; but its contents were legible (490). H. D. Jensen admitted he had some books, including the accounts receivable book at home a month after the fire (546, 574, 575), which were never exhibited to Appellant's representative (545-550).

B. Likewise, Appellant Properly Requested to Examine H. D. Jensen Under Oath, But He Did Not Appear to Be Examined.

The record is uncontradicted that a proper written request was made of and received by Eureka Lumber Company, Appellee and H. D. Jensen that the latter appear for an examination under oath, but he did not appear or notify Appellant he was available (Ex. H, 208, 210, 217).

C. The Books of Account, Invoices and Examination Under Oath Were Material to a Determination by Appellant of Its Liabilities.

First, there was an alleged "out of sight loss" of at least $20,600.00 (Ex. K).

There was no evidence that Appellee requested any seller for a copy of any invoice after the fire and before he filed this action.

By use of the books of account, the invoices and a physical inventory after the fire, Appellant could accurately determine "any" out of sight loss (548). Likewise, with said books and invoices Appellant could verify the accuracy of the inventory of $28,080.00 set forth in the financial statement given to the Crocker-Anglo Bank 11 days before the fire (Ex. 18 or AY); or in the financial statement as of December 31, 1955, fixing the total inventory at $15,478.11 (Ex. 17) (571).

Second, it was essential for Appellant to determine the identity and capacity of the named insured Eureka Lumber Company[18] and whether H. D. Jensen had an

[18]No certificate of doing business under a fictitious name was filed until after the issue of examining Harold Dee Jensen and the production of books of account arose. See: Ex. 4, October 31, 1956.

insurable interest in the loss. From the records he examined, Stearns learned that moneys of the Company were being deposited in H. D. Jensen's bank account prior to the fire (559). At the trial, Appellee testified such deposits were for lumber H. D. Jensen was buying for the Company (233); but on October 12, 1956, Appellee testified H. D. Jensen was running his personal business through Eureka Lumber Company (234), and after the fire H. D. Jensen was operating under the Eureka Lumber Company name (235). Therefore, Stearns specifically requested he be shown the invoices reflecting the lumber purchases for money deposited in H. D. Jensen's account.

Through the time of the trial, no such invoices or the requested books were produced (559-560).

Third, before it could pay the claimed loss, Appellant was entitled to examine H. D. Jensen concerning the time and origin of the fire, the presence of inflammable fluids at the point of origin and in stacked lumber, his flight from the building, the "out of sight" loss in the Proof of Loss, the doing of business in the Company's name, his interest in the business, and the disappearance of the books and other records of the business under his control.

Therefore, the motions should have been granted because the evidence was uncontradicted that the requested material, books, invoices and records were in the possession of Appellee immediately before and after the fire; but neither they nor copies thereof were shown to Appellant's designated representative before

or after this action was filed; and the named insured, Appellee and H. D. Jensen were actually and properly notified of the request to examine H. D. Jensen under oath and although he was available for the examination, he did not appear; his knowledge and activities surrounding the business, the time and origin of the fire, the Proof of Loss and the records were material to any decision Appellant was to make as to its liability for this loss.

CONCLUSION.

Appellant respectfully urges that the Judgment be reversed with direction to the trial Court to enter judgment in favor of Appellant on the ground that the evidence as a matter of law demonstrated neither the named Insured Eureka Lumber Company nor Appellee complied with the requirements of the policy to produce books, invoices and the other records or to submit H. D. Jensen for examination under oath; or, the Judgment should be reversed on either of two distinct grounds: (1) that there was substantial evidence warranting the submission to the jury the issues of fraud, concealment, incendiary fire and a conspiracy to defraud by setting the fire and swearing to and filing a fraudulent Proof of Loss, relating to such defenses under the answer and the third Party Complaint, or (2) that errors of law occurred in rejecting financial evidence of motive, refusing to allow cross-examination of Appellee concerning the failure of

H. D. Jensen to appear for examination under oath, Appellee's knowledge of the inventory, admitting hearsay and secondary evidence, by instructing the jury that the burden was on Appellant to prove Appellee "wilfully" failed to produce books and records, and by failing to instruct the jury on the defenses of right to an examination under oath, fraud and concealment relating to knowledge of time and origin of the fire, production of books and records, incendiary fire and conspiracy to defraud by setting the fire or falsely swearing or filing a fraudulent Proof of Loss.

Dated, San Francisco, California,
April 1, 1958.

AUGUSTUS CASTRO,
Attorney for Appellant.

(Appendix Follows.)

Appendix.

Appendix of Exhibits